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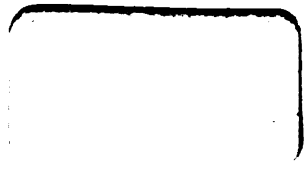

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THE DUTIES OF CIRCUIT JUDGES IN EX PARTE DIVORCE CASES.

J. B. MCMAHON.

It is a matter of common knowledge that the growth of the divorce business in the circuit courts of Michigan has been one of the most noticeable and deplorable facts in the history of our jurisprudence. It is not difficult for men of middle age to recall the time when a divorce case attracted unusual attention on the part of the public, because it was regarded as something extraordinary; and it was safely assumed that the facts upon which it was based were of a sensational and startling character. In those old-fashioned days the marriage tie was a matter of solemn import. It was not mistaken for a necktie, to be changed with the fashions. The growth of our complex civilization has brought about many changes. It has established new points of view in politics, religion and sociology. Individualism has been swallowed up, and lost in the press of combinations, and the old-time family is feeling the effect of this loosening of the bonds. A divorce case in these days is not a matter of any interest, unless surrounded by very unusual complications, or unless it drags through the mire of nasty publicity the names and family affairs of those who have occupied a prominent place in society. We now read in the papers with entire composure that a court in a single term has granted fifteen or twenty divorces; and has "put asunder" twice as many people whom, according to the words of the service, "God has joined together." We do not assume because of this large number of cases that anything of a startling or sensational character has transpired in the court. They were simply dry divorce cases of the usual character, devoid of any incidents, except such as might

have happened in almost any family whose members were not well bred and refined. The prosy, every day life, with its round of unpoetic duties had become irksome. The wife had lost her early freshness, health and beauty, and the husband is without imagination to fill the wrinkles, and supply the flush and charm of youth's bright freshness and glory; or the wife had tired of a morose and unappreciative husband, and some other man has flattered her. The harvest is ripened for the sickle of the shyster, and lo! it shall not go unharvested. He is the only alert member of the community. He is on hand with his unholy suggestions, and his re-assuring smile. The matter will be very easily adjusted. He will need a little money, of course, "to get the witnesses," and then he will catch the judge sometime in his office, to avoid publicity. He will be sure to select a time when the judge is unusually hurried and weary, and by reading the testimony with just the right inflections, and perhaps supplying a word here and there which the witness inadvertently omitted, this together with the report of his particular friend, the circuit court commissioner, and the prepared decree is signed, and the unholy business is consummated. There are usually one or more of these home despoilers in every community, and still the lightnings of heaven go on hitting things of value.

We cannot explain this composure on the part of the public, except to say it is a toleration of something which is supposed to be unavoidable—the composure of despair. None have the hardihood to defend the situation, except those who profit by it, or those whose loose views of the marriage relation are not acceptable in any enlightened community. We readily accord our assent to the proposition that the family is an institution that lies very close to the foundations of the state; that upon the sacredness and purity of the marriage and family relation depend, in large measure, the happiness, moral decency and wholesomeness of the community. We know that, as a rule, our citizens will be no better than the homes from which they come, and in which they are reared. We know full well that the impressions of childhood are the foundations of character; that "the stream can rise no higher than its source." Is our stolid composure justifiable, then? This vital interest of the community—of the state—in the family has been recognized by the courts of every civilized country, and is to be read between the lines in the legislation of them all. It has been declared by the courts of many states, Michigan among the number, that in

every proceeding for divorce there are three parties in interest, viz: the nominal parties, complainant and defendant, to the record, and the state. This doctrine is very forcibly stated by Judge Cooley in the case of *People v. Dawell.*[1] This was a prosecution for bigamy. The defense was that before the second marriage the defendant had been divorced from his first wife, on her application, in the court of common pleas of Noble county, Indiana. The record of those proceedings was introduced, and apparently sustained the defense. It was shown that the proceeding was a fraudulent one; that both parties at the time the alleged divorce was granted were actual residents of Michigan, and the question in the case, so far as we are concerned with it, was whether the parties by their consent could give validity to the divorce, otherwise void. Judge Cooley says: "But it is said that if the parties appear in the case, the question of jurisdiction is precluded. That might be so if the matter of divorce was one of private concern exclusively. But such is not the case under our laws, nor will it ever be until it comes to be understood that parties have the right to marry and unmarry at pleasure, and that if they choose to trade spouses, it is the concern of nobody but themselves. Such an understanding would require a considerable change in the existing laws of this state. As these laws now are, there are three parties to every divorce proceeding; the husband, the wife, and the state; the first two parties representing their respective interests as individuals, the state concerned to guard the morals of its citizens, by taking care that neither by collusion or otherwise, shall divorce be allowed under such circumstances as to reduce marriage to a mere temporary arrangement of concern or passion."

These strong words uttered by Michigan's eminent and distinguished jurist more than twenty years ago have forever set at rest the policy of our laws on this vital question. Their spirit and intent are wise, conservative and just, whatever may be the faults in their administration; and, until the whole scheme of our legislation upon this subject shall have been revised, it must be regarded as settled that the state is a party in interest in every case which is brought to secure the dissolution of the marriage relation. Indeed a state which should enact otherwise would be considered as having placed itself outside the pale of respectability in our times. Any broad and statesmanlike view of the duties and pre-

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[1] 25 Mich., 247.

rogatives of the state makes this doctrine necessary. It cannot afford to abdicate its essential functions. It cannot, in the sane exercise of its powers, trust to the regulation of private contract a matter which so vitally concerns the general welfare, and its own permanency, prosperity and strength. High and enduring civilization has always been coupled in history with a careful, jealous and scrupulous regard for the sacred character of the family. Any loosening of the marriage relation, any trifling with its sanctity, permanency and binding force, have always been speedily followed by a wasting of the moral fiber of the community, and consequent disaster and decay.

Such are some of the more obvious evils to be combatted, and such the spirit and intent of our laws on the subject of marriage and divorce. It is not the purpose of this paper to criticise these laws, or to suggest remedies for existing abuses through the medium of legislation. It may well be that much remains to be done in the way of legislation before we shall achieve all we desire. It is far from my purpose to suggest on the part of the judges any disregard of the laws as they are. It is our unquestioued duty to enforce the laws as we find them, not to engage in judicial legislation, so called. I recognize fully that, upon a certain showing being made, parties are entitled to a divorce under the law, and the court has no right to withhold it. It is the purpose of this paper to see what, if anything, may fairly and honestly be done under the laws and conditions as they exist to mitigate a known and acknowledged evil and disgrace to our fair state and its jurisprudence. Neither is it the purpose of this paper to criticise the manner in which the courts of this state have conducted this class of cases in the past. I simply wish to raise the question whether it is not in the power of the courts to correct some of the abuses which have fastened themselves upon this branch of the practice, and which are most manifest, and universally acknowledged and deplored.

Since this subject was assigned to me I have talked with a large number of the judges, and have found but one sentiment. They feel that they have been often victimized, and made the unconscious tools of the unscrupulous and designing, and they resent it with all the heat and resentment of honest men who love justice, and hate fraud and deceit; but they have felt themselves powerless to stem the tide, because they have felt isolated and without support. It is one of the sternest features of a judge's life that he

must assume the gravest responsibilities, and must carry the load alone. He cannot run to his dearest friends for advice. In solitude he must face his difficulties, and overcome them. If we all work together the case will not seem so hopeless. It is clear that under existing laws this reform, if it comes at all, must come through the courts. In this and in many of the states there are laws requiring the prosecuting attorney to appear in certain divorce cases where there are minor children. This law, for some reasen, is a farce, and worse than useless. I have made diligent inquiry for a prosecuting attorney who carries out the provisions of this law in its true spirit and intent, but I have not found him yet. I said the law is a farce. It is, and so is every law which tends to divide responsibility, and is not carried out. It is a dead letter, except that part of it which provides for the manner in which the officer shall be compensated for his arduous labors. This part of the law never seems to have been overlooked or misconstrued. The prosecuting attorneys themselves seem to regard the law as a farce and a nuisance, and for the paltry fee of five dollars they do not choose seriously to interfere with the plans and desires of a brother practitioner who is looking for an easy road to a divorce, and a fee which is probably contingent. The matter is therefore left where it was before. If any one is to look after the interests of the state and the minor children, it must be the presiding judge. He is an officer of the state, and it is clearly his bounden duty to scrutinize each case of this kind that comes before him with toilsome and unwearying patience. This is not a pleasant task. It will entail much additional labor upon judges, many of whom are already sufficiently burdened with work; but duty often tramples upon convenience.

In what ways, then, can we best guard against fraud and imposition, and rectify the abuses that are most obvious in this class of cases?

I.—Let it be an inflexible rule, subject to no exceptions, that every *ex parte* divorce case must be heard in open court, in broad daylight, in the presence of as many spectators as may choose to attend, and let there be no secrecy about the proceedings—no whispering the case in the ear of the court.

It has been the practice in some of the circuits, to my personal knowledge, to hear these cases at odd moments, often outside the regular hours of the session, in the evening, sometimes in the offices of the attorneys. The pretext has been that it saved time,

and scandal, and spared the blushes of the complainant who "had never been in court," and did not wish to take the witness stand. I deplore the scandal of these proceedings as much as any one; but this practice is much more of an accommodation to the dishonest litigant than to the candid and honest one. It is all wrong—wrong in principle and bad in practice. It is not desirable that divorces should be made easy. Perjury is greatly facilitated by this privacy. Collusion finds itself quite at home in the private office, in the presence of those only who are conspiring to forward it, when it would be exceedingly uncomfortable in open court surrounded by those who might easily have, and perhaps produce, the evidence of the real facts. Whatever is fit to be done in a court of justice at all, whatever is honest, righteous, fair, is fit to be done in daylight, with open doors, in a frank and public manner, and will gain no advantage by concealment. No honest case will be furthered by darkness. No honest litigant should desire it. The counsel should be required to stand in their accustomed places, and read the testimony in a tone so that every one who wishes may hear it, and all of it. We must bear in mind continually that we are dealing with a class of cases in which the state is a party in interest, and which, therefore, every citizen has a right to hear, if he chooses to do so. Neither the silence, admissions, nor even the consent of parties will justify a divorce, and the public who have a legitimate interest in the proceedings have a perfect right to be present, and to know what is done in their case. This will lend an air of open candor to these proceedings at once, and will do much to free them from the suspicion of secrecy and silence which has, not without reason, hung around them. It will rid the court of embarrassment. It will bring confusion upon a class of practitioners who disgrace the ancient and honorable profession of attorney at law, and inspire the public with a greater respect for the courts.

II.—There is no class of cases in which an adherence to the settled rules of practice, and to all those forms prescribed for the attainment of justice should be more inflexibly required than in these applications for divorce. The common law disabilities of witnesses, except where plainly and unequivocally removed by statute, should be scrupulously enforced; and all the proceedings should be according to the highest standards, and according to the most approved forms.

It is a matter of common knowledge that it is extremely easy

to find scandal-mongers who will seize upon the most trivial incidents in the life of any family, and by a process peculiar to their craft, magnify them into matters of great seriousness. It is extremely easy to make a charge, and to support it by circumstances perfectly innocent in themselves, and entirely capable of an honest explanation; and yet these innocent circumstances, perverted by malice, and misinterpreted by over zealous intermeddlers with the affairs of others, may be so handled as to present a plausible appearance, and seemingly to justify the court in dissolving the family relation. There are, unfortunately, in most communities a class of harpies who prey upon the reputation of others, and who especially delight in disrupting families. They easily confound what they have heard, and what they have suspected with what they know. They are seldom impressed by the disparity between their knowledge, which is usually very small, and their suspicions, which are luxuriantly great; and they are as likely to swear to their suspicions as to their knowledge, and far more likely, if they are not cross-examined. A court must have the tact to discriminate the true from the false; to read human nature as a book, and allow for shrinkage in the romances of these professional busybodies. It is far better for the court to err in the direction of over strictness as to proofs, and as to conformity to rules, than to lend its countenance and support to a criminal laxity in a matter where already too much looseness of construction has prevailed.

III.—The court should see to it that the proofs are full and adequate on all essential points, not relying too much upon the reports of commissioners who are often lax and careless in this respect. The commissioner has the temptation before him of prospective fees, and the class of attorneys who make a specialty of divorce practice will invariably seek the services of the commissioner who is the most pliable and accommodating in his findings and reports. These reports which were doubtless intended to relieve the court of much drudgery are frequently, in practice, an embarrassment rather than an assistance. The court must himself examine every line of the testimony, and form his own conclusions upon it. He has no right to abrogate or delegate his prerogatives and duties. The witnesses should, when it is deemed best, be required to appear in person before the court, and he should examine them carefully so as to bring out all the facts, and guard against collusion. He should inquire as to their relations to the complainant, and their interest and bias in the case, and see that

their testimony is based upon their actual knowledge of the facts and not upon their suspicions, or upon hearsay. In short, no pains should be spared by the court to get at the real facts of the case. The court should be satisfied that the application is not made in the interests of a second marriage. I have personally known of more than one case where the divorced complainant has gone directly from the court room to the office of the clerk, and there obtained a license to marry the principal witness upon whose testimony, in large measure, the divorce had been granted. This may not be a case where the "funeral meats did coldly furnish forth the marriage feast," but it comes very near being a case answering that description.

IV.—It is of course evident that the minor children of these unfortunate marriages should be the objects of the courts especial care and regard. With tender solicitude he should look to the interests of these unfortunate little ones, subordinating all other considerations to their welfare. Here, my brethren, is a solemn trust. We cannot avoid this great responsibility if we would. Upon the wisdom of the court in these proceedings may, and probably does, depend the future usefulness of these helpless little ones—their destinies and happiness. All other considerations should be forgotten as compared with this. The parties to the case are often hardened, hopeless creatures whose usefulness is at least problematical, whose lives are so blasted as to be most unpromising soil for any future growths of use or beauty, but here is virgin soil, and here the lover of right and justice, the man of large sympathies, the lover of his kind, may find scope and opportunity for doing lasting and eternal good. Let the judge feel this in his inmost soul, as he should, and the destinies of these helpless children will burden and weigh upon his soul more than all the cases involving mere money considerations which he may be called upon to try. The question of the custody of these children and the care for their future maintainance and education is a very momentous one. Upon a right decision of this question may depend their temporal and eternal welfare. It may make in them all the differences which exist between hardened criminals and useful and honorable citizens. The early surrounding of a child are the determining forces of its future. This has become almost an axiom. Therefore when there are minor children to be looked after, and it is determined that the parents must be divorced the court should exhaust every source of information,

accessible in determining the overmastering question of their future care and maintainance, and should bring to the solution of the question a clear head and a sympathetic heart. The state is most deeply concerned here, and has a right to expect of us the most solicitous and scrupulous care, the fruits of our best and highest wisdom.

A single judge may be able to do but little to rescue this branch of the practice from the hands of disreputable and conscienceless practitioners, but the united action of all the judges of the circuit courts of the state would soon be felt as an irresistable power for good. We can circumvent the sharpers who have no other practice, who prey upon the public, and who encourage parties to begin proceedings for divorce upon the most frivolous pretexts. It may result in starving a few worthless shysters out of the alleged practice of the law, and force them to soil their hands by a little honest labor, but this result would, I think, be endured by the community with composure, and the reign of righteousness on earth would not be in the least retarded. Such a course on the part of the judges will result, if persisted in, in an increased respect for the sacredness of the marriage relation, and deter parties from entering upon it thoughtlessly and on slight acquaintance. It will publish to the world that, in Michigan at least, the state of matrimony is not a temporary makeshift, to be entered upon in jest, and discarded at pleasure, a matter for a midsummer holiday. It will restore to the family its ancient sanctity and honor, and make of it what it should be, the holiest place on earth, the spot where all that is best in human nature is nurtured and strengthened, where life receives its origin and all its holiest and best inspirations; where noble citizens are reared in high resolves, and in reverence for their country's laws and institutions. I am not a dreamer who expects a millenium to result from this one reform. I simply think that we may help it on a little. This is no innovation upon the laws. It is simply an attempt to administer, and interpret them in a spirit of justice and equity. This has always been their spirit. They have simply met the fate of the man on the road to Jerico, and we must rescue them. We can at least do our duty, and abide the consequences with serene patience, believing that at last time will justify every manful course which "makes for righteousness," and all honest endeavors to benefit our human kind.

CIRCUIT JUDGES AND THE CRIMINAL LAW.

C. B. GRANT.

The circuit judge occupies the most important and most influential position within the gift of the people. He is of the people, from the people, and among the people. His outgoings and incomings are daily before their eyes. His rulings affect the rights of both the person and property of the citizen. Thousands who never see the inside of a church, and many of whom are in a great measure ignorant of our laws and institutions, enter the court room and there obtain their chief knowledge of our laws and institutions. He is familiarly known as the "old judge" regardless of his years. His language, habits and character are the subject of daily comment. The court room will be just what he chooses to make it. He can make it a place of bar room manners, with feet upon chairs, tables and benches, and the great American spitters squirting tobacco juice upon carpets and floors, or a place of cleanliness, neatness and decorum, equal to those of a well regulated dwelling house. He can make it a beer-garden for the use of unprofessional language and conduct, or he can make it so orderly that unprofessional language and conduct will be practically unknown. The trial court is either a great civilizer or a great demoralizer. The object of the law suit is to attain justice and the result is largely dependent upon the judge. He is his own master—amenable only to his own conscience. In charging the jury and in sentencing prisoners all eyes and ears are directed to him, and in them the people read the character of the man and determine how their rights are protected.

It goes without saying that in criminal cases he occupies a most responsible position. He is bound to see that the accused has a fair trial. He is likewise bound to see that the people have a fair trial. The people have no appeal to the court of last resort when mistakes are committed against them. It is his duty to watch the trial and the arguments to the jury and to see that neither the attorney for the people nor the attorney for the accused wanders outside the record. It is held that the prosecuting attorney has no legal right to declare to the jury his belief in the

guilt of the accused. It must be equally true that the attorney for the accused has no right to declare to the jury his belief in his client's innocence. Both should be excluded and attorneys promptly checked in such statements, and confined to the evidence.

The learned dean of the New York University law school said, not three months ago: "The greatest present danger to our country is now seen in the spirit of lawlessness." About the same time his brother, a distinguished divine, in a sermon preached at Albany, N. Y., used similar but more emphatic and pointed language. He said: "It (lawlessness) is seen in the proposition in our own state to put upon the highest bench in this state a man whose chief claim to the nomination lies in the fact that he has openly and flagrantly violated the law in order that he might confer a partisan advantage upon his party in an hour of critical trial. It is seen in the open, flagrant, undisguised setting at naught of the law, by the liquor traffic in this city, in New York, in the state, I might almost say, in the nation."

Much of this language is applicable to the condition of affairs in the state of Michigan. More disgraceful acts of lawlessness than those which have taken place in this state can hardly be found elsewhere in the entire country. No law controlling the liquor traffic has ever been observed by those engaged in it until obedience thereto has been wrung from them at the hands of the courts and the officers. Until within the last few years the liquor law of this state was practically set at defiance. The circuit judge could not walk the streets of his own city or village, or of any city or village within his jurisdiction without becoming aware of that fact. The results of these violations appeared, occasionally at least, in the criminal records of his court. This suggests the query, whether any duty is by law imposed on the circuit judge when the criminal laws of the state, over violations of which the circuit courts have exclusive control are disregarded and crime goes unwhipt of justice, beyond the trial of those cases which the police and prosecuting officers may see fit to bring before him. Experience has shown in many if not most places, that if he waited for them his courts would not be troubled with much litigation of that character. It has undoubtedly been the prevailing impression that the duty of the circuit judge begins and ends with the trial of criminal cases. It is of no little importance to the people to determine if this be so, our criminal laws are in the main wise, and their rigid enforcement will contribute largely to the welfare of society.

Section 9554 of How. Stat., reads as follows: "Grand juries shall not hereafter be drawn, summoned or required to attend at the sittings of any court within this state, as provided by law, unless the judge thereof shall so direct by writing, under his hand, and filed with the clerk of said court." No grand jury can therefore be summoned in this state except at the direction of the circuit judge. Is he under no obligation to summon it? Is it a mere matter of discretion upon his part? May he sit silent upon the bench when officers are neglecting the express mandate of the law, and the wise laws of the state are openly and notoriously disobeyed? In my judgment, it is his duty to summon the grand jury when the occasion arises. When the occasion arises the duty follows. Should the police officers of any county neglect or refuse to prosecute a murderer, or to prosecute a gang of notorious corrupt municipal boodlers, can there be any doubt as to his duty? In my judgment the lawlessness of a mob of lynchers should be immediately followed by the summoning of a grand jury of the county, and the judge in no uncertain language should charge them as to the nature of the crime, and their duty to bring in true bills of indictment against those found to have participated in it. Lynchers are in the eye of the law guilty of murder. The summoning of a grand jury and instructing them as to violations of the liquor law and kindred offences would in my judgment speedily result in putting an end to these open violations of the law, and the disgrace which is thereby placed upon the state, and our civililation. I do not think any one will venture to deny this statement.

While I think that the use of a grand jury once a year would have a very wholesome effect and save many times its cost in the prevention of crime and pauperism, it might perhaps be unnecessary, if the sheriff and other police officers were forcibly reminded by the judges of their duty to enforce all the criminal laws of the state, and that they were subject to removal from office if they neglected their duty in this regard.

Shortly before I went upon the circuit bench a lynching affair took place in one of the counties of my circuit which was disgraceful and revolting in the extreme. It might readily have been avoided by the exercise of caution and courage on the part of the officers. I informed the officers that I should call a grand jury unless they instituted criminal proceedings, which they did. Soon after entering upon the duties of the office I discovered that notorious dens of prostitution existed in the vicinity of most of

the cities of my circuit. Crimes were forced upon my attention which originated there. There was no attempt at concealment. I informed the officers that I should feel compelled to call a grand jury unless they took immediate steps to bring these criminals to trial. I found it unnecessary to summon them. When the liquor law of 1887 went into effect, which for the first time gave the circuit courts exclusive jurisdiction over the violation thereof, I took a similar course with the like effect, except that in one county in 1889 I was compelled to call a grand jury which resulted in many indictments,

A careful investigation of the law when these things were called to my attention convinced me that I could not under my oath of office avoid the responsibility, and that a circuit judge--the chief officer of the circuit court--was under the legal obligation to see that the requisite machinery for the enforcement of the laws when the officers failed to investigate and bring offenders to trial, was put in operation. Is it not to the circuit courts that the people have a right to look to see that their laws are enforced? If not, where should they look? Is it not the duty of the circuit judge to summon the grand jury under the circumstances I have above mentioned?

This is the question I submit for your consideration and discussion. If you answer it in the affirmative and act accordingly, the result will be a decrease of crime, reduced taxation, less pauperism, a greater respect for law, fewer divorces, and the greater certainty of the permanence of free republican government. If you answer it in the negative and act accordingly, you will make criminals and law-breakers happy.

Lansing, Mich.

NOTES.

MEMORANDA CASES.—The supreme court at every term render several decisions, upon motion and original application, in which memoranda, but no written opinions, are filed. These "memoranda cases," as they are called, often involve nice questions of practice, and a desire for their publication and preservation in some form has more than once been expressed by members of the profession. It is the intention of the supreme court reporter to collect these decisions hereafter, and report them from time to time in the Michigan reports. That they may reach the profession sooner, we have arranged to publish them each month as soon as handed down. This month a digest of the memoranda decisions of the past year is given.

THE DETROIT BENCH.—The opening of the January term of the Wayne county circuit court found an array of three new judges. Judges Frazer and Hosmer hold over, and Judges Donovan, Carpenter and Lillibridge sit for the first time, having been chosen at the last election. All these gentlemen have the respect of the Wayne county bar, which augurs well for their success. The docket for the ensuing term is one of the longest for many years there being eighteen hundred and twenty-three cases for trial.

W. W. Chapin, who was recently elected associate recorder of the city of Detroit, took his seat January 9. Judge Chapin is one of the youngest men who have sat on a bench in the state of Michigan. Nevertheless he is pre-eminently qualified for the responsible position.

TRADE COMBINATIONS.—The New York court of appeals has confirmed the decision of the supreme court of that state in *People v. Sheldon*,[1] to which we referred when first decided.[2] It is now pretty well settled in that state that a combination of coal dealers, to control and prevent competition in prices, is unlawful, and that the members who enter into the combination may be convicted of conspiracy. That the prices are reasonoble, and the fixing thereof constitutes no overt act, does not lessen the amenability to the law. The gravamen of the offense is held to be the combination. This same principle applies, of course, to all branches of trade. The decision is good law and in furtherance of the principles of justice. The purpose of such agreements is to prevent competition in trade. No good can possibly come of them, save to the members themselves. In no way can the public be

[1] 47 Alb. Law Jour., 185; 21 N. Y. Supp., 859; 48 Alb. Law Jour., 490. Decided in higher court Oct. 3. (Andrews, C. J.)

[2] 2 Mich. Law Jour., 161.

benefited by them. That the price fixed in any single instance is not unreasonable should not be considered. Such combinatoins are capable of working injustice, and in very many cases do. The safest way to guard against the abuse of the power they afford is to provide against all of them. Every state should enact a similar law and enforce it.

RURAL ADVERTISEMENTS.—A bill is pending before the English parliament which the legislators of this country wonld do well to consider. It is to prohibit advertisements in public places in rural districts. The preamble states that it is expedient to prohibit the raising of unsightly erections which destroy the beauty of rural scenery in Great Britain and Ireland. No more laudable object could be sought. If some similar measure can be adopted to protect not only the rural scenery but also the "suburban scenery" in this country, it will be appreciated by a disgusted public. The advertising fiend has placed his blighting mark upon both. Unsightly bill-boards have been erected at the most prominent points along every popular drive. Glaring circus bills cover the buildings within sight of the road. From the car windows, and from the cottage door at the resort, one can look on the beautiful scenery only to find it marred by an advertisement of some kind. Near every large city the highways, suburban and elevated railways, are lined with all kinds and varieties of signs and advertisements, oftentimes disgusting in character. Every state legislature could not do better than to enact a law similar to the bill referred to. The following is the bill in full as given in the *Law Journal* (London):[1]

"(1) No person shall affix to or inscribe, mark, engrave, or otherwise delineate on, any pillar, post, gate, fence. fence-wall, hoarding, board, tree, or any other thing whatsoever so as to be visible to any person being or passing along any highway, main road, footpath, bridle path, railroad, canal, navigable river, or any place open to the public, any picture, or printed or written matter, or any advertisements, or signs of any sort whatsoever. (2) Any person contravening this act shall on conviction be liable to a penalty not exceeding 5*l* for each such offence, to be recovered in manner provided by summary jurisdiction acts. (3) Nothing in this act shall apply to any place within the boundaries of any parliamentary or municipal borough or within the district of any urban sanitary authority; or to any place within the precinets of any. railway station, pier, or landing-place; or to any guide or sign-posts erected by or with the sanction of any public authority or by any railway company. (4) Nothing in this act shall apply to any advertisement on or affixed to any dwelling-house, or to any advertisment erected by any person upon land which is in the

[1] 28 L. Jour., 857 (Dec. 16).

occupation of that person to advertise any business or trade which is *bona fide* carried on by that person upon that land; or to advertisements for the sale or letting of any lands or tenements upon which the advertisements are erected."

NEW CIRCUIT JUDGES.—This month nineteen new circuit judges take their seats upon the bench, while twenty old ones continue in the duties to which they have been re-elected. The new judges, the circuits over which they preside and their home counties are as follows:

Second—Orville W. Coolidge, Berrien.
Third—J. W. Donovan, W. M. Lillibridge and W. L. Carpenier, Wayne.
Seventh—Charles F. Wisner, Genessee.
Eighth—Frank D. M. Davis, Ionia.
Tenth—Robert B. McKnight and Eugene Wilber, Saginaw.
Twelfth—J. A Hubbell, Houghton.
Thirteenth—Roscoe L. Corbett, Grand Traverse.
Fourteenth—Fred J. Russell, Oceana.
Fifteenth—George L. Yaple, St. Joseph.
Sixteenth—James D. Eldridge, Mecosta.
Eighteenth—A. C. Maxwell, Bay.
Nineteenth—James B. McMahon, Mason.
Twenty-first—Peter F. Dodds, Midland.
Twenty-fourth—Edward L. Babcock, Huron.
Thirty-third—Oscar Adams, Emmett.

The former judges were either re-elected or else their terms did not expire in the following circuits:

First—Victor H. Lane, Lenawee.
Third—George S. Hosmer and Robert Frazer, Wayne.
Fourth—Erastus Peck, Jackson.
Fifth—Clement Smith, Barry.
Sixth—Joseph B. Moore, Lapeer.
Ninth—George M. Buck, Kalamazoo.
Eleventh—Joseph H. Steere, Chippewa.
Seventeenth—Wm. E. Grove and Allen C. Adsit, Kent.
Twentieth—Philip Padgham, Allegan.
Twenty-second—Edward D. Kinne, Washtenaw.
Twenty-third—Wm. S. Simpson, Oscoda.
Twenty-fifth—John W. Stone, Marquette.
Twenty-sixth. Robert J. Kelley, Alpena.
Twenty-seventh—John H. Palmer, Mecosta.
Twenty-eighth—Fred H. Aldrich, Wexford.
Twenty-ninth—Sherman P. Daboll, Clinton.
Thirtieth—Rollin H. Person, Livingston.
Thirsty-first—Samuel W. Vance, St. Clair.
Thirty-second—Norman W. Haire, Ontonagon.

THE WORK OF THE COMMITTEES OF THE STATE BAR ASSOCIATION.—The convention of the circuit judges at Lansing on December 27, 1893, is an encouraging sign that the lawyers of the state—for judges are the people's lawyers—have not entirely lost all appreciation of the necessity of inaugurating an earnest reform movement in the profession of the law. The circuit judges, if we are to judge of their intentions by the papers read at their meeting, intend to confine themselves to the treatment of problems concerning the bench. It is to be hoped that they will devote their entire energies to those reforms which affect themselves and the machinery of the law which they have been selected to operate, and leave the other reforms, whose name is legion, to the state bar association.

The supposition is that the committees of the state bar association, to which have been entrusted the principal work of the association, have by this time formulated suggestions for the association to consider and act upon at the next annual meeting, on the first day of the June term of the supreme court, or at such time as the board of directors may name for the annual meeting, and undoubtedly already have their reports well under way. If they have not their suggestions formulated or their reports outlined, they should lose no time in commencing their work.

The most important of these committees is the committee on legislation and law reform, composed of: Edward Cahill, Lansing, chairman; George P. Wanty, Grand Rapids; Alfred Russell, Detroit; Henry M. Duffield, Detroit; and George W. Weadock, Saginaw. This is a very strong committee, and is made up of lawyers who take enough pride in their profession to spare a little of their time in an effort to improve the profession, and are not likely to resort to the threadbare apology that they did not prepare a report bescause they were "too busy." Upon the thoroughness and excellence of their reports depends in great part the success of the annual meeting and the effectiveness of the work of the association. We presume that in accordance with the provisions of the constitution, the committee caused information to be given, between September 1, 1893, and November 1, 1893, through the public press or otherwise, that it at all times invited suggestions, formulated in writing, as to the law relating to the administration of justice, and directed such suggestions to be mailed to the secretary of the association at Grand Rapids, and indorsed "For the committee on legislation and law reform." We infer, and it is a fact to be regretted, that none of the lawyers of the state responded to their invitation, since the secretary reports that no such suggestions have been received by him.

The other committee of the association is the committee on legal education and admission to the bar, composed as follows: Claudius B. Grant, Lansing, chairman; John W. Champlin, Grand

Rapids; Edwin F. Conely, Detroit; Charles H. Wisner, Flint; and Delos Boudeman, Kalamazoo. This too is a committee remarkably strong in its personel. Their work is scarcely less important than that of the committee on legislation and law reform, as upon theeffectiveness of their recommendations, when put into effect, depends the very character and standing of the profession. The questions they have to deal with are very live ones, and they should have no difficulty in collecting material for a very valuable report and for the formulation of new laws governing the admission of aspirants to practice before our state courts.

The pages of this journal are open to these committees, if they wish to address themselves to the profession in the state, and invite suggestions from attorneys who take enough interest in their profession to devote a portion of their thought to plans for its betterment.

PROCEEDINGS AT THE CONVENTION OF JUDGES.*—A convention of the judges of Michigan was held at the supreme court room, Lansing, on December 27, 1893, at one o'clock P. M,, pursuant to a call by the Hon. Fred J. Russell, judge elect of the 14th judicial circuit. The Hon. Fred. J. Russell, of Hart, was elected chairman, and Samuel W. Vance, of Port Huron, secretary. The following were present:

Governor John T. Rich, chief justice Frank A. Hooker, justices Claudius B. Grant, and Robert M. Montgomery, of the supreme court, and the following circuit judges: Victor H. Lane, William L. Carpenter, George S. Hosmer, Erastus Peck, Clement Smith, Joseph B. Moore, Charles H. Wisner, Frank D. M. Davis, Vernon H. Smith, George M. Buck, Roscoe L. Corbett, Fred N. Russell, George L. Yaple, James B. Eldridge, Allen C. Adsit, Andrew C. Maxwell, James B. McMahon, Peter F. Dodds, Edward D. Kinne, Fred H. Aldrich, Sherman B. Daboll, Rollin H. Person, Samuel W. Vance.

Governor Rich addressed the convention on "Our Penal Institutions."[1] Justice C. B. Grant, of the supreme court, read a paper on "Circuit Judges and the Criminal Law." This paper was discussed at some length and with much earnestness by Judges Maxwell, Hosmer Aldrich, Daboll, Buck and Smith. Judge Joseph B. Moore, of Lapeer, read a paper on "Avoidable Delays in the Circuit Courts of this State." This paper called forth a free, interesting and instructive discussion, participated in by Justice Montgomery and Judges McMahon, Buck, Dodds and Peck. Judge Fred H. Aldrich, of Cadillac, read a paper on "The Court and the Jury," which was listened to with much in-

*The papers read at the convention will be published in full. Those of Justice C. B. Grant and the Hon. J. B. McMahon appear in this issue.

[1] The governor did not speak from manuscript and we hope to secure the substance of his recommendations and publish it in a later issue.

terest but no discussion followed. Judge Sherman B. Daboll, of St. Johns, read a paper on "The Rotation of Judges." This paper attracted much interest and was discussed at considerable length by Judges Maxwell, Clement Smith, Vernon H. Smith and Vance.

The convention after an informal discussion took a rising vote as to the advisability of permanent organization, which resulted in a unanimous vote in its favor. On motion of Judge Vance, of Port Huron, the following committee on permanent organization and order of business was appointed: Judges Vance, Hosmer, McMahon, Buck and Adsit.

The convention took a recess until 7:40 P. M., after which Judge James B. McMahon, of Ludington, read a paper on "The Duties of Judges in *Ex Parte* Divorce Cases." The reading of this paper and the discussion that followed was listened to with more than usual interest, and drew forth many strong facts and instances growing out of *ex parte* divorces. The discussion was participated in by Judges Maxwell, Buck, Hosmer, Lane, Daboll, Dodds, Vance, Corbett, Russell and Kinne. Judge Peter F. Dodds, of Mt. Pleasant, read a paper on "Measures for the Prevention of Perjury," which was fully discussed at a later stage in the convention's proceedings. Judge Andrew C. Maxwell, of Bay City, addressed the convention on "Some Questions Arising under Recent Tax Laws." Judge Maxwell spoke without manuscript and offered some valuable suggestions, among which were that judges should use care and caution in confirming tax sales under the new law and avoid as far as possible the sacrifice of valuable property at nominal or inadequate prices. The same subject was discussed at some length by Judge Erastus Peck, of Jackson.

Judge James B. Eldridge then announced the sudden death of the wife of the Hon. Watson Beach, of Lexington, and after speaking feelingly in reference thereto asked for the appointment of a committee to draft suitable resolutions representing the sympathy of the convention with Judge Beach in his sad bereavement. The chair announced as such committee Judges Eldridge, Daboll, and Lane. The convention then adjourned until December 28, 1893, at 8:30 A. M.

The second session of the convention was called to order by the chairman, who called for the report of the committee on permanent organization and order of business. The committee, through its chairman, Judge Vance, reported the following constitution, which was adopted.

CONSTITUTION.

This association, composed of the judges of the supreme and circuit courts and municipal courts of Michigan, shall be known as the "Association of Judges of Michigan."

Its object shall be to profit by an interchange of views and experi-

ences, to promote simplicity and uniformity of practice, to promote and advise within proper spheres such legislation as may be deemed advisable for that purpose, and such changes and amendments as may be deemed necessary to avoid ambiguity and conflict in our laws, to the end that the laws may be the better understood and enforced, and the ends of justice attained with promptness and uniformity.

Its officers shall consist of a president, vice-president, secretary and treasurer, who shall be elected for one year, and annually thereafter, and they shall perform such duties as usually appertain to such officers.

A committee of three shall be elected for one year and annually thereafter, to be known as the executive committee, whose duty shall be to arrange a program and designate the order of business at the annual and such other meetings as may be held, and perform such other duties as may be assigned to them.

Such other committees may be created from time to time as may be deemed advisable with such powers and duties as the association may prescribe.

There shall be an annual meeting held at such time and place as the executive committee shall designate. Special meetings may be called by the president on the recommendation of the executive committee.

Such by-laws may be adopted from time to time as may be necessary to more effectually carry out the provisions of this constitution.

This constitution may be amended at any regular or special meeting by a two-thirds vote of those present. Fifteen of the persons eligible to membership shall constitute a quorum for the transation of business.

The Hon. Fred J. Russell was elected president, the Hon. Sherman B Daboll, vice-president, and the Hon. Joseph B. Moore secretary and treasurer, by unanimous vote. The president, vice-president, and the secretary and treasurer were made the executive committee for the present year.

An initiation fee of $1 is charged to members and annual dues of $1 each year thereafter to defray the necessary expenses of the association.

An informal discussion followed upon the advisability of adopting uniform rules in the circuit courts and municipal courts of record throughout the state. Judge Daboll, of St. Johns, then offered the following resolution which was adopted:

WHEREAS, it is the opinion of this association that much good would result from the adoption of uniform rules of practice of the different circuits and municipal courts of record in this state, therefore

Resolved, That a committtee of three be appointed by the president on rules whose duty shall be to formulate and report to this convention uniform rules of practice for the different circuit and municipal courts of record in this state so far as practicable.

The president appointed as such committee Judges Erastus Peck, William L. Carpenter, and Fred H. Aldrich. Judge Vance offered the following resolution, which was adopted:

WHEREAS, much difficulty is found by judges in construing statutes arising chiefly from conflicting and limiting clauses in the same act, and from conflicts with and limitations by other existing statutes, and also from ambiguous language, uses, and

WHEREAS, it is believed much good would result if the judges would note these conflicts, limitations and ambiguities and prepare amendments or changes to avoid the difficulties and recommend their passage to the legislature from time to time, and such other laws as would simplify and make more uniform the practice in our courts, and

WHEREAS, much care and consideration should be given to such matters, therefore

Resolved, That a committee of three be appointed, to be known as the committee on legislation, who shall examine and report to this association from time to time all such bills as may be submitted to them, with their approval or disapproval, to the end that this body may from time to time recommend to the legislature amendments and changes in the laws in furtherance of public justice. Be it further

Resolved, That each member of this body be requested to prepare three copies of such amendments and changes as he may deem necessary to make more simple and plain the laws and practice and forward them to the chairman of this committee.

The committee appointed to draft suitable resolutions touching the death of the wife of Judge Beach reported as follows:

WHEREAS, This association of judges of Michigan in convention assembled have learned with deep regret of the sudden death of the wife of our brother Judge Watson Beach, of the 24th circuit, on the 22nd inst., therefore

Resolved, That this association tender our sincere sympathy to our brother and his family in their sad bereavement.

Resolved, That this resolution be spread upon the minutes of this convention and that the secretary send a copy thereof to our brother Watson Beach, of Lexington.

The executive committee were empowered to take such steps and recommend such action to the members of the association as may tend to carry out the recommendations and remedy the defects pointed out by Governor Rich in his address to the association at the present session.

Judge Dodds then offered the following resolution. which was adopted:

With a view to lessening the evils resulting from the giving of false testimony in the circuit courts of this state, be it

Resolved, That it is the sense of this association, that the judges of said courts use all proper means in their power to instruct in and keep before the people doing business in such courts the nature of the oath administered therein, the enormity of the crime of perjury and the penalty for its commission.

The association adjourned without day subject to the call of the president through the executive committee.

LAW SCHOOL NOTES.

E. F. JOHNSON, EDITOR.

H. C. WALTERS, ASSISTANT.

Thomas John, '93 law, is situated at Proo, Utah.

W. N. Sullivan, law, 93, reports a good business at Emporie, Kan.

F. H. Kleekamp, 93 law, and who is located at Fort Wayne, Ind., spent the vacation here.

Miss Emma Eaton, of the "one year men," as she has openly wished to be called, has been appointed clerk of the practice court.

O. H. Carson law, '93, spent the holiday vacation visiting his numerous friends here. He is located at Indianapolis, Ind , and says he is succeeding beyond all expectation.

F. L. Fowler, law, '90, has located at Manistee, Mich., and formed a partnership with Thos. E. Swurthwaite. Mr. Swurthwaite is one of the most prominent lawyers of northern Michigan.

Champ Ross, law, 93, has located at Houston, Texas, and formed a partnership with a Mr. Coleman, of that place. His friends say but few of his class have made as good a business arrangement as has Mr. Ross.

It cannot fail of pleasing Prof. Mecham to see so much energetic and enthusiastic work being done in the preparation of cases to be tried early in the history of the new practice court. We say history of the court because it bids fair to fill a long discussed want in the otherwise excellent law course in the U. of M.

We are satisfied that the class of '94 will look back after their first year or two of actual application of the knowledge acquired while here, and breathe words of highest praise upon the authors of a real power for the testing of their capacities for the trial of cases when they were looking forward with dread speculation as to the outcome of their first lawsuit. Every thing is being done to make the practice court in all practical respects similar to the dignified arena where our rights and duties as citizens are declared.

MONTHLY DIGEST OF MICHIGAN DECISIONS.

ASSUMPSIT—Recovery of Costs—Timber Contract—Trespass—Damages. In an action of assumpsit it is error for court to charge that if plaintiff recovers less than $100 defendant would recover costs. The rule laid down in 48 Mich., 322, applies to actions of tort only. A written contract claimed to have been entered into between plaintiff and defendants, under which defendants are entitled to all the timber, cut into logs, upon certain described premises belonging to the plaintiff, the contract contemplating that the logs should be cut by plaintiff, does not give defendants the right, against plaintiff's protests, to enter upon plaintiff's lands and cut the timber. In such case defendants would be trespassers, and plaintiff would not be limited to the price fixed by the contract. Sigma v. Montgomery. (Dec. 23.) McGrath, J.

ATTACHMENT—Officer's Return—Presumption of Regularity. When in a writ of attachment the officer was commanded by the writ to seize property of defendant, and he returns that by virtue of that writ he has levied upon the property described, but does not return that it was the property of the defendant, the fair and reasonable intendment in such cases is that the property taken belonged to the defendant, and it will be presumed that having acted, he has done so in accordance with the mandate of the writ. Horton v. Moural. (Dec 23.) McGrath, J.

ATTACHMENT—Sufficiency of Writ.—A description of timber in a writ of attachment as "about 2,000,000 feet of pine and hemlock lumber, and also about 300 cords of staves," is sufficient. Dillon v. Howe, et al. (Dec. 23.)

BREACH OF CONTRACT, when Recovery upon, Barred. When a person enters into a contract to sell exclusively to one party in a certain district, and he afterwards makes sales of his goods to a second party in the same district, the fact that the first party to whom the goods were sold was doing business without the required license, though unknown to the party selling the goods, would bar his right to recover for breach of contract. Niagara Falls Brewing Co. v. Wall. (Dec. 23.) Grant, J.

CO-TENANCY — Conveyance of Timber by Co-tenant — Partition. — A conveyance by one co-tenant of all his interest in the timber on lands held in co-tenancy is good as between the parties to it, but it is not to be permitted to affect injuriously the rights of the co-tenants; and the grantees of such interest in the timber have the right to ask and obtain partition of the lands held in co-tenancy, even after the grantor of such timber has conveyed his remaining interest in the lands to third parties. Mee, et al, v. Benedict, et al. (Dec. 23.) Montgomery, J., (Grant, J., dissenting.)

DAMAGES — Defective Sidewalk — Evidence — Instructions to Jury. —In an action for damages for injuries received in a defective sidewalk, when it appeared by the testimony of the sidewalk inspector that the walk had been repaired the day previous to the accident, it is error for the court to refuse to instruct the jury that if they believed the testimony of the

sidewalk inspector that the plaintiff could not recover. Dittrick v. City of Detroit. (Dec. 23.) McGrath, J.

EVIDENCE—Copies of Books and Papers in Hands of Sheriff on Writ of Attachment—Duties of Sheriff in Regard thereto—Mandamus.—Information obtained from books of account and private papers held by sheriff on a writ of attachment, admitted to be void, cannot be used in evidence, or as the foundation for the institution of another suit; and the sheriff in allowing copies of such books of account, letters, etc., while in his possession to be taken is guilty of an abuse of his office. It is error for a circuit judge to refuse to grant a writ ordering the person holding such copies to deliver up the same. Rosenthal v. Muskegon Circuit Judge. (Dec. 23.)

EVIDENCE—Matters Equally within Knowledge of Deceased Persons.—In a suit prosecuted or defended by heirs or representatives of a deceased person, the opposite party cannot testify to matters equally within the knowledge of such deceased person. Floyd, et al., v. Hollenbeck. (Dec. 23.) Grant, J.

MALICIOUS PROSECUTION—Probable Cause The burden of proving want of probable cause, in actions for malicious prosecution, is upon the plaintiff, and if the defendant, when he caused arrest of plaintiff, placed all the material facts of the case before the prosecuting attorney and acted upon his advice, he is not liable if he acts in good faith Harris v. Wood ford. (Dec. 23.) Hooker, C. J.

PARTITION—Presumption as to Regularity—Admissibility of Parol Evidence in Collateral Proceeding. In an action to recover compensation upon an oral agreement, founded upon an inequality in the partition of an estate, during the partition proceedings, where it does not appear that the court decreed commpensation by one party to the other, it must be presumed that no irregularity existed, and this presumption cannot be overthrown by parol evidence in a collateral proceeding. Burger v. Beste. (Dec. 23.) McGrath, J.

QUO WARRANTO - Rights of Persons adjudged entitled to Office pending Writ of Error.—The relator of any information in the nature of quo warranto, adjudged entitled to any office, may take immediate possession; and this right cannot be defeated by accused party suing out a writ of error and giving bond to stay execution. People *ex rel* Wagenseil v. Stevenson. (Dec. 23.) Montgomery, J.

TRESPASS ON THE CASE—Proximate Cause. Where a horse became frightened and ran away by the falling of a window into the street, and was injured by running into a pile of rails, which the defendant company had piled in the street, the proximate cause of the injury is held to be the frightening and running away of the horse, and even though the defendant company may have been negligent in piling its rails upon the street, they are not liable. Bleil v. The Detroit Street R'y Co. (Dec. 23,) Grant, J.

*MEMORANDA CASES IN WHICH NO WRITTEN OPINIONS ARE FILED.**

APPEAL FROM JUSTICE COURT—STAY OF EXECUTION—RELEASE OF SURETY ON APPEAL BOND.—A circuit judge has no power to extend the liability of the surety on a bond on appeal from justice court by a stay of execution made for that express purpose, and upon his own motion. Gildersleeve v. Adsit, Circuit Judge.

APPEAL—ADDITIONAL BOND—DISCRETION OF CIRCUIT JUDGE.—The discretion of a circuit judge in ordering a defendant who has appealed from a judgment in summary proceedings to recover the possession of land, to file an additional appeal bond, will not be interfered with by mandamus; the appellant having the right either to file a new bond or to make a showing before the circuit court as to the sufficiency of the sureties in the original bond. Felcher v. Brevoort, Circuit Judge.

ATTACHMENT—STOCK—BENEFICIAL INTEREST.—Shares of stock in which the debtor has only a beneficial interest, the legal title to which is vested in a third person as trustee, are not subject to attachment.

ATTACHMENT—APPEAL FROM ORDER OF DISSOLUTION—NOTICE OF TRIAL—SERVICE. Service of notice of trial of an appeal from order dissolving circuit court writ of attachment is properly made upon the attorney of record for the plaintiff in the attachment suit, who appeared for appellant in dissolution proceeding and made an affidavit of appeal in his behalf. Roskopp v. Canfield, Circuit Judge.

ATTORNEY AT LAW—SUSPENSION FROM PRACTICE.—Mandamus is not the proper remedy to review an order suspending an attorney at law from practice. Underwood v. Palmer, Circuit Judge.

CAPIAS AD RESPONDENDUM—SUFFICIENCY OF AFFIDAVIT.—An order quashing a writ of *capias ad respondendum* on the ground of the insufficiency of the affidavit, the allegations of fraud therein being hearsay, will not be vacated by mandamus. Moyle v. Haire, Circuit Judge.

CHANCERY—CONSENT ORDER—MANDAMUS TO VACATE.—Mandamus will not lie to compel a circuit judge to vacate a consent order, made and entered in a chancery suit. Fisher v. Ramsdell, Circuit Judge.

CHANCERY—RECEIVER — HOW APPOINTMENT REVIEWED — CREDITOR'S BILL.—Mandamus will not lie to compel circuit judge to vacate order appointing receiver. Mandamus is not the proper remedy to review an appealable order in a chancery case. Irregularity in the appointment of receiver is no ground for objection, by defendant in a judgment creditor's bill, to an examination concerning his property and effects. Thomas v. Gartner, et al., Circuit Judges.

COSTS—STENOGRAPHER'S RECORD—COPIES DURING TRIAL.—In the fourteenth judicial circuit, the cost of the stenographer's record of the

* Under this head, hereafter, will be given a report of cases decided each month upon motion and original application, in which no written opinions are handed down. This month, by the courtesy of Hon. W. D. Fuller, supreme court reporter, a digest of the memoranda decisions of 1893 is given.

proceedings of the trial, used for the purpose of exceptions, may be taxed as costs, if the party procuring them prevails in the supreme court, under How. Stat., § 6534 *b4*. Turner v. Muskegon Machine and Foundry Co.

CONTEMPT—REFUSAL TO PAY COSTS—WHEN CERTIORARI AND NOT MANDAMUS PROPER REMEDY.—Certiorari is proper remedy where one has been adjudged guilty of contempt in refusing to pay costs awarded against him on a continuance. Mandamus will not lie to vacate the contempt order. Love et al. v. Vance, Circuit Judge.

CRIMINAL LAW — COMMITMENT — DISCHARGE FOR DEFECT — SECOND COMMITMENT—HABEAS CORPUS.—One who has been discharged upon *habeas corpus* for a defect in commitment may be subsequently arrested and imprisoned upon a second commitment in due form issued by the same justice on the same order. *In re* Edward Reinheimer.

CRIMINAL LAW—EXAMINATION—JURISDICTION OF JUSTICE OF PEACE —TRANSFER.—A justice of the peace has no power to transfer the examination of a respondent, brought before him upon a warrant issued by him; to another justice, upon affidavit of respondent that the justice who issued the warrant is a material witness for him upon such examination. The jurisdiction of neither justice is lessened nor enlarged by the transfer. People v. Duncan.

CRIMINAL LAW—MURDER—JURISDICTION OF CIRCUIT COURT COMMISSIONER—ADMISSION TO BAIL.—A sheriff cannot be compelled by mandamus to bring a prisoner committed for trial upon a charge of murder before a certain circuit court commissioner on his application to be admitted to bail, when there is another circuit court commissioner and a circuit judge, residents of same county, by either of whom it will be presumed that the prisoner may be admitted to bail. A circuit court commissioner has power to admit to bail except in cases where the proof is evident or the presumption great. Nixon v. Garner, Sheriff.

DECLARATION—AFFIDAVIT OF SERVICE, WHAT MUST SHOW—MANDAMUS.—Mandamus will lie to set aside a default judgment, where the affidavit of service of the declaration, by which the suit was commenced, fails to show how the service was made. People's Mutual Benefit Society v. Frazer, Circuit Judge.

DEFAULT—SETTING ASIDE PREMATURE DEFAULT—SECURITY FOR COSTS BY NON-RESIDENT.—Where a non-resident plaintiff gives security for costs upon an order therefor made upon application, the default of defendant for not pleading, entered upon the same day that the security is filed, is prematurely entered. Mandamus will lie to set aside the default and vacate a judgment based thereon. Rankans v. Padgham, Circuit Judge.

INJUNCTION — MANDAMUS TO DISSOLVE — JURISDICTION OF CIRCUIT COURT.—Upon an application for mandamus to dissolve an injunction, where it appears that the case was within the jurisdiction and power of the circuit judge, it will not be reversed. Chiera, et al., v. Brevoort, Circuit Judge.

MANDAMUS TO SUPPRESS DEPOSITION.—A circuit judge will not be compelled by mandamus to suppress a deposition taken in a chancery suit. The question should be raised upon appeal. Chandler et al. v. Pailthorp, Circuit Judge.

MANDAMUS.—The granting of a motion for new trial will not be compelled by mandamus when the petition fails to show that any evidence was

produced in support of the motion. O'Brien v. Chambers, Associate Judge of Circuit Court, Detroit.

MANDAMUS TO QUASH WRIT OF CERTIORARI—HIGHWAY COMMISSIONER—Mandamus will not lie to quash a writ of *certiorari* issued to review the proceedings of a highway commissioner, there being an aequate remedy by appeal. Gibson, et al. v. Lane Circuit Judge.

MANDAMUS, REFUSAL OF CIRUIT COURT TO HEAR—REMEDY.—The proper remedy where a circuit judge illegally refuses to hear an application for mandamus, under circuit court rule No. 107, is to apply to the supreme court for an order to compel him to do so. Backus v. Carleton, County Treasurer.

MANDAMUS—PETITIONS FOR, SUFFICIENCY OF.—(1) An order to show cause upon a petition for mandamus to compel vacation of order setting aside judgment will be denied where the petition fails to show that an application has been made to the circuit judge for the relief asked. Hitchcock v. Circuit Judge.

(2) Where it appears that the public interests require the immediate disposition of the case, and forbid the delay of awaiting an opportunity to apply to the circuit court, the order to show cause will be granted. Loranger, Township Treasurer, v. Navarre.

MUNICIPAL CORPORATIONS—COMMON COUNCIL—APPOINTMENT REQUIRING CONFIRMATION BY MAJORITY—MEMBER VOTING FOR HIMSELF.—Where the charter of a city requires all appointments to office to be concurred in by a majority of the members of the common council, mandamus will not lie to compel the recognition of a member as entitled to an office to which he has been appointed, when his petition fails to show his confirmation by a majority, exclusive of his own vote. Tinker v. Jackson Board of Public Works.

NEW TRIAL—DEPOSITION OF UNWILLING WITNESS.—Mandamus will not lie to vacate an order for the issuance of a commission to take the deposition of a witness, who refuses voluntarily to make his deposition, on a motion for a new trial, under How. Stat., § 7766. Muskegon Booming Co. v, Dickerman, Circuit Judge,

PROBATE COURTS—DISMISSAL OF APPEAL—MANDAMUS TO VACATE—LACHES.—Mandamus will not lie to vacate an order dismissing an appeal from probate court after the time limited for bringing *certiorari* has expired. Crittenden, Guardian, v. Reilley, Circuit Judge.

PROBATE COURT, DECISIONS OF, HOW REVIEWED.—(1) Mandamus will not lie to compel the appointment of commissioners in dower; the proper remedy is an appeal from the order of denial. Pulling v. Durfee, Probate Judge.

(2) Mandamus will not lie to compel the allowance of a contingent claim against an estate. An appeal from the order of disallowance is the proper remedy. Hancock Mutual Life Ins. Co. v. Durfee, Probate Judge.

SCHOOL COMMISSIONER—COMPENSATION OF ASSISTANT VISITOR.—Where the commissioner of schools has not determined the compensation of the assistant visitor, as required by Act No. 147, Laws of 1891, mandamus will not lie to compel payment for services rendered by the assistant. Hicks v. Board of Auditors of Wayne County.

SUPREME COURT, PRACTICE IN—FAILURE TO PRINT RECORD.—The failure of appellant to print and serve record as required by supreme court rule No. 59, is not sufficient ground for dismissing writ of error, where neither party has ever noticed the case for hearing. Leland v. Township of Blair.

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*AVOIDABLE DELAY IN THE CIRCUIT COURTS OF THIS STATE.**

JOSEPH B. MOORE.

The title of this paper was suggested to me by a very able paper read by Hon. Alfred Russell, at the annual meeting of the American Bar Association, held at Boston, in 1891, entitled: "Avoidable Causes of Delay and Uncertainty in our Courts."

The discussion by the learned gentleman in his paper, relates almost wholly to the condition of things in the federal courts of this country, and necessarily his paper and mine traverse little ground in common. Where it touches upon common ground at all, I regret to say that I am compelled to differ with the distinguished gentleman, both as to the question of fact raised and as to the remedy suggested. I shall speak of that later in this paper. To those of you interested in the discussion of the subject, as it relates to the fedeaal courts, I commend Mr. Russell's paper as being exceedingly able, thoughtful and well prepared.

It ought to be possible in all the circuit courts of this state to have every cause placed on the calendar, called at least four times a year in all counties of upwards of twenty thousand inhabitants, and to have every cause so called, that is ready for trial, tried.

This is the normal condition of most circuit courts of this state and, if there are any circuits where this condition of things does not exist, it is because of the fact that the avoidable delays in the trial of causes have made an unnecessary accumulation of business; for it cannot be possible, with the great number of circuits now existing, and with the great number of trial judges, and with the facilities of doing the work we are afforded by the short-hand reporter and the type-writer, that there are any cir-

* A paper read at the recent convention of judges, at Lansing.

cuits in this state where the proper methods are pursued, where it ought not to be possible to have the business of the court expeditiously, certainly and rapidly disposed of.

Just now a great deal of time is being occupied, at the various meetings held by the lawyers, and in the columns of the law magazines, urging as a substitute for our present system of pleadings, the adoption of a code. The gentlemen who favor this change are intelligent and enthusiastic, and they desire, I have no doubt, an honest improvement in the methods of the administration of justice. It is no part of my purpose to commit myself against the adoption of a code. Personally it would make no difference whatever. I have this suggestion to make, however, that a man who has common sense enough to practice law or to preside, as a trial judge, could learn either system in a few weeks of earnest, systematic study, so that it ought not to be possible for any cause to be delayed in its trial for the reason that the pleadings were prepared under the present system, or under what our reformer friends desire to have substituted for it, a code. Whatever grievances may have existed under the common law system of pleadings, I have no hesitancy in saying, that under our simple system they are not now burdensome. In a somewhat active practice, now running through about twenty-five years in the various courts of record in this state, I cannot recall two cases that were thrown out of court because they were improperly laid. So that whether our present system be retained, or a new one adopted, I do not believe it would affect the question of avoidable delays, either the one way or the other.

Another set of reformers would have the avoidable delays attributed to the fact that the system of jury trial still exists, and in the very able paper of which I have already spoken, Mr. Russell says very severe things with reference to jury trials. To quote from him briefly on that subject, he says: "What may be deemed the second principal cause, and perhaps, indeed, the chief cause of delay and uncertainty in our courts is the jury system in civil cases. . . . In its existing practical operation it would seem as if the jury system, in civil causes, were purposely contrived to produce delay and uncertainty. . . . The jury is an illustration of what John Stuart Mill calls, the influence of obsolete institutions on modern ideas, and which he says: 'Perpetuate in many of the concerns of life, mitigated barbarism.'" And Mr. Russell adds, "The jury, to my mind, is one of those things."

He says: "Suitors with honest causes now avoid juries as a general rule, if possible, but with an ill cause almost invariably demand a jury, and it is proverbial, that before a jury you gain the causes you expect to lose, and lose those you expect to gain."

Of course it may be expected that Mr. Russell having this view of the jury system, advises that in civil causes it be done away with wholly. While I dislike to disagree with so distinguished a gentleman, I cannot forego the remark that Mr. Russell's practice before juries must have been under very exceptional circumstances. Whatever the condition may be in the large cities, and I presume a great deal of the criticism of Mr. Russell, and the newspapers, in relation to jury trials in the large cities is well taken, I think the remedy is to be found, not in a condemnation of the system itself, but in an entire reform as to the method of administration. If, when in the course of the business of the court, men like J. L. Hudson, Allan Sheldon, and Russell A. Alger are drawn for jury service in any of the courts of Wayne county, the trial court would have the moral courage to say to these men, "You have the very best things that the earth has to offer to men; you have wealth and great business interests, and honors without number, all made possible by the system of government under which we live, the perpetuity and the hope of which is, respect for a righteous administration of the law." It is the duty of Gen. Alger and J. L. Hudson and Allan Sheldon, and any other man, however high his social condition may be, to discharge his work as juror, just as much as would be expected from Richard Doe and John Smith, and required them to do jury service. If they had a little of that kind of the administration of the jury system in the large towns, there would be no longer adverse criticism of the jury system. I think twenty-five years of pretty active practice in the courts as trial lawyer and judge, allows me to know something of the judges who preside over them, and the juries who decide causes, especially in the interior counties. The judges are but men; they have their prejudices, their passions, their friends, and, I am afraid, some of them their enemies; and, while they are honest men, they are less likely to properly determine a question of fact than twelve men selected from the ordinary walks of life would be. It is better for the judges and better for the parties who are interested in relation to controverted questions of fact, that those questions of fact should be passed upon by men who have been selected from

different standpoints in the various walks of life. I had rather have the judgment upon a question of fact of twelve ordinary jurors, selected in the ordinary manner, than the judgment of any judge, however honest or however impartial he may be. The jury system will continue to be a part of the system of our court procedure. Should it be suggested that the disagreement of juries is a cause of delay, I answer: If the cases are properly prepared by the attorneys, and properly tried by the judge, the disagreements are not appalling. My experience would lead me to say that they were less than one per cent. of the causes actually tried. If this proportion should be found to be insupportable, I have no doubt it would be easy to get an amendment to the constitution, allowing the verdict of nine out of the twelve jurors to control in civil causes; the system then would be an ideal system for the trial of questions of fact.

It is a fortunate thing in the administration of the business of the circuit courts when the interests of the people are looked after by an able, honest, intelligent and industrious prosecuting officer. Such a man reduces the avoidable delay on the trial of criminal causes to the minimum. Oakland county is possessed of such an officer, and in that circuit during the four years, ending with the first of January last, he had tried one hundred and thirty-six criminal cases, and had them so well in hand that he secured one hundred and thirty-two convictions. His cases were so well tried that but one of them was reversed on appeal to the supreme court, and he hazarded the suggestion that that would not have been done if the case had been properly argued before the court of last resort. Perhaps he was right about that, though I hazard no opinion.

I have spoken of these things so far, but in none of them, except the last, is there to be found any very considerable relief for avoidable causes of delay. I think if we would be frank with ourselves in stating conditions, it will be found that where there is an intelligent, efficient administration of the business of the court, then there are no avoidable causes of delay. Of course, sickness is an excuse, and want of co-operation of fellow judges, when there are several judges on one circuit; under such conditions the work will accumulate.

When the business of the court is found to accumulate until the court is getting buried beneath its accumulations, it will be found that the trouble is with the court itself; and should any

of you gentlemen, the first of January, find yourselves confronted with a docket, coming to you from your predecessor, that is so long as to appall you, I beg of you to believe that you will not diminish it if you commence your sessions of court on Tuesday instead of on Monday; nor by opening court at ten o'clock, holding until twelve, adjourning to two o'clock and then holding until four or half past four o'clock, and finally, adjourning court for the week on Friday afternoon. There is no legitimate business that can be successfully run upon any such method, and the courts are not an exception. It does not hurt a man, who is qualified to be a judge, to do continuous and systematic work. I should say it would not hurt him the least bit if his sessions were at least three hours long in the forenoon and an hour longer in the afternoon. Of course the matter of details is a matter for each one to determine.

In my practice I have found it advisable to have the jury summoned for the second day of the term. This enables the first day of the term to be given up to the arraignment of criminals and the hearing of the various motions that are so plentiful always on the first day of the term and which makes the first day of the term the busiest one of them all. It has the added advantage of having the jury absent during the discussion of some questions which relate to causes that may be tried before them later; it also saves the counties of the circuit very considerable expense.

A few years ago, I was called to hold court on an adjoining circuit that had a clerk who was so incompetent and lazy that his journal had not been written up for weeks and probably for months. If I had such a clerk as that I would give him to understand the third day of the term that he had better find a new line of employment and send somebody to the clerk's desk who would do the business of the court. I deem it a matter of essential importance that the journal should be written up when the circumstances are all fresh in the mind of the court and of the counsel, and that it should be signed regularly, preferably every morning after reading. Continuances should be granted of course, but counsel should be given to understand they must get their causes ready for trial. The lawyers will soon learn the temper of the judge in that direction, and will have their cases ready. On the second day of the term, at the conclusion of the reading of the journal, there should be the same condition of order in the court room that is to be found in a Presbyterian church

during the opening morning prayer, and that should be the normal condition of the court room during the transaction of all its business.

While the counsel are selecting the jury the court should be examining the files and pleadings in the case, and by the time the opening address has been made the court ought to be familar enough with the case, and how it is likely to open out, so that he can pass quickly and intelligently upon the admission of evidence; these questions should be disposed of with great promptness, and as a rule, without argument.

If the court is in doubt as to the competency of the evidence, a few direct questions put to the counsel will draw out such a condition of things that he can pass intelligently upon the question and the case should move on quickly. During the taking of the evidence, if the court is at all familiar with the digests and decisions of the supreme court he will make himself familiar with all Michigan law bearing upon the question. If this is done, as a rule, the legal argument will be very brief. The judge should always be willing to listen to counsel, but he should not en courage a wordy argument to prove the truth of the multiplication table.

The charge to the jury is perhaps the most important function performed by a trial judge. It should never be a legal essay and should never be addressed to spectators in the court room. For myself, I prefer an oral charge, but that will depend upon temperament and habits of thought; every judge must decide for himself. The charge should be short, clear and positive in its character, dealing with simply such legal questions as are involved in the case at issue. It should be clothed in language as terse, simple and direct as is at the command of the judge, and if the jury is inexperienced in jury work, it is well to say to them that a circuit court is devised for the settlement of cases that parties are not able to settle themselves; that in order to have a case ended a verdict is essential; that they should go to the jury room, not in the character of disputants, but with the idea of harmonizing the evidence as far as they are able to, and where they are not able to do that, to consider it all and determine where the truth is.

If the case has been properly tried by counsel and properly directed by the court, a verdict will by found by the jury in ninety-nine cases out of one hundred. I now speak of the court cases

at law. Some of the lawyers who, in fact, desire a jury, never ask for one, hoping the trial judge will order a jury where questions of fact are involved; such lawyers ought to be disappointed. While it is not pleasant for a trial judge to dispose of issues of fact, it is a duty he ought not to shirk, and with the aid of the shorthand reporter, it is not at all difficult to determine questions of fact and issues of law as well.

I come now to speak of that branch of the law that is a blur upon its administration, to wit: The chancery causes. The chancery rules provide for the commencement, the preparation and the final disposition of a chancery case, within reasonable limits, but the practical working of the system now is that contested chancery cases simply hang on interminably. Indeed the celebrated case of *Jarndyce v. Jarndyce* is not without parallel in this country. I have known chancery cases to drag their weary length along, so that the attorneys who commenced them could hardly remember when the cases were commenced. I have a case in mind now, where weary weeks were spent in taking irrelevant and incompetent testimory before a circuit court commissioner, when the case could have been tried and well tried, including the arguments, in two days, if the testimony had been taken in open court. It is my judgment that the rules ought to be so amended, now that every court is provided with a shorthand reporter, as to require the testimony in all chancery cases, except the computation of amount due on mortgages, to be taken in open cout. This would give the judge an opportunity to see the witnesses and determine something of their truthfulness, and the case could be tried more expeditiously, more effectively and more satisfactorily than under the present method.

The statute ought to be amended so that the circuit judge should be authorized to pass upon the competency and relevancy of the testimony, and admit it or reject it as he should find it was, one or the other. If these changes could be made it would shorten the trial in chancery cases very materially, and would hasten a dispostion of them very greatly.

The practice that prevails among many judges of taking the files in chancery cases home with them, after the case has been argued at length, is to be greatly deprecated. There is no time when the judge is so well prepared to dispose of a case, as just after he has heard all the testimony and had the benefit of the arguments of counsel, who have made themselves familiar with

the strong points of their case from their respective standpoints. I knew an estimable judge who had at least a bushel of files of undecided chancery cases in his office, they had grown upon him and worried him greatly. He was obliged to say to his successor in office, that so much time had elapsed since the argument he must turn the cases over to him for a re-hearing. If there should be some controverted question, either of fact or law, that the judge desires to take a little time to determine, he should embrace the first opportunity to dispose of that matter, and, under no circumstances, should he allow the case to go undecided longer than during the session of the term.

The business of one term should be ended before another is begun, and all the journal entries should be properly made and signed, so that if death should come to the trial judge suddenly, as some of us hope it may, when it comes at all, there will be no unfinished business for his successor to do over again, because of the neglect of duty upon his part.

I cannot say the final word in this paper, without suggesting that it is a mistake to attempt establishing the dignity of the bench at the expense of the working members of the bar. A few years ago I was called to try a case for a neighboring judge of great ability, and for whom I have great respect. I sat by while he called the calendar for the term, and during the entire progress of the call he belittled the practicing lawyers and did not grant a continuance, without lecturing the attorney who applied for it, saying delays were expensive and they were made at the expense of the poor farmer and the over-burdened taxpayer. It made me sick, and as I closed my eyes and thought of myself as twenty years before I had timidly sought a place among the trial lawyers, and had for twenty years struggled with them, under all conditions and circumstances, and realized their industry, their zeal, their integrity and their loyalty to the interest of their clients, I thought that the judge could not have known these men as I knew them, or he would not treat them with so little respect; and as my mind went back from there and I realized the immense services the working lawyers had rendered to the national government and the state; and as I thought of the incorrigible Sam Adams, all so busy with the argument, that taxation and representation should go hand in hand, iterating and reiterating it until it became the thought of all the colonies and resulted in the declaration of independence, and the seven years of long and weary warfare which

resulted in the establishment of what we are pleased to believe is the greatest government on the face of the earth; and as I thought of the multitude of legal minds that have shed glory upon every phase of our society; of Wirt, and Otis, and Patrick Henry, and of the godlike Daniel Webster, and John Marshall, that greatest of all judges, whose interpretation of the constitution gave us a federal government instead of a confederacy; and coming down to our own state, of the Lothrops, the Duffields and the Ponds; the Crofoots, the Baldwins, the Seagers, the Mays, the Hughes, the Hanchetts, and the great Judges Christiancy, and Graves, and Cooley and Campbell, and of the hundreds of lawyers, great and unknown whose minds had illuminated every phase of society, so that if by any possibility we could turn off the light that came from their minds it would seem as though all the lights had gone out, I felt as though I never could have it in my heart to say words that would tend to disparage the working members of the bar. A more intelligent, a more loyal, a more peacemaking, a more useful class of citizens, in proportion to number, is not to be found in our commonwealth.

Gentlemen, judges elect, I hope that each of you may prove to be a successful trial judge, and that none of your circuits will have any "Avoidable Delays in the Trial of Causes."

*MEASURES FOR THE PREVENTION OF PERJURY.**

PETER F. DODDS.

When requested to prepare a paper for this occasion, it occurred to me that some good might be accomplished by challenging your attention by a few remarks on the line of measures for the prevention of perjury. Not claiming that people are more prone to evil now than formerly, nor that the tendency to false swearing is but keeping pace with increasing depravity—because I am persuaded that the general blessings of education and civilization tend toward right living—but claiming that the prevalence of perjury, the great enemy of justice, is due very largely to indifference on the part of those to whom the people have entrusted the temple of justice and the sacred rights of life, liberty and property, in not keeping the enormity of the crime continually before the public by every possible means, including the rigid enforcement of the laws for its prevention.

The baneful effects of false testimony have been felt in all countries during all the ages of history. It was provided against in the Jewish law, and no system worthy the name has existed or now exists that did not or does not in some form include the mandate: "Thou shalt not bear false witness." Formerly the punishment for this offence was death, but the growing genius of our civilization seems to have decided that the certainty of punishment rather than its severity, tends to prevent the commission of crime; and certainly no one will be heard to claim that justice in this regard will fail because of the inadequacy of the penalty provided by the statutes of Michigan. A person who is successfully prosecuted will consider fifteen years amply sufficient in which to repent of his crime and reform his life in that regard. It is surely sufficient to inspire such wholesome dread as to cause those who are placed upon the witness stand to confine their statements to the truth, if only it were reasonably certain that all testimony would be scanned closely, suspicious statements investigated, and ascertained violations of the statute followed by vigorous prosecution.

* A paper read at the recent convention of judges, at Lansing.

The *Detroit Evening News* in its editorial columns makes the following comment upon a late case: "A wretched fellow was sentenced to the state prison for five years, Saturday, in the recorder's court of this city, for the conventional crime of perjury. As a piece of downright justice, nobody can say that five years are too severe a sentence for such a crime. But downright justice is not, under all circumstances, upright justice. Unpunished perjury is so common a thing in this country that the poor wretch had no reason to think he was doing a very horrible thing when he gave false testimony on a simple whisky case. If during all his life he had been accustomed to seeing men sent to prison for perjury, his punishment would be only what he would have reason to expect, but it was doubtless as great a surprise to him to be sent up for five years as it was to the rest of the world to see it done. If this sentence means that the courts are going to turn over a new leaf and protect themselves henceforth against all perjurers of all names and grades, the case must be regarded as a very good beginning indeed; as a mere exception to the rule, it is surely pretty rough on the man who furnished the exception."

If not true this article would be a most inexcusable libel upon the judicial system of our state; yet I doubt whether any one would be willing to take the burden of proving its falsity. The point to be aimed at, it seems plain, is certainty that the people of the state of Michigan will not brook nor countenance the act of "bearing false witness." In criminal proceedings perjury tends to place the criminal beyond the power of the state, by making it difficult and sometimes impossible for the people to make him answer for his crimes; from its effects, it often results that the penalty of the crime is visited upon the innocent, while the guilty go "unwhipt of justice."

In civil proceedings the case is analogous, though the result of falsehood is less disastrous. A dishonest plaintiff, in courts established for the administration of justice, by perjury and subornation of perjury may, and doubtless often does obtain his neighbor's property, while an honest plaintiff may be met by a denial and a "trumped up" counter claim offered by a dishonest defendant who by "manufactured evidence" as it is called, not only prevents his opponent from recovering his just dues but actually obtains a judgment in his own favor; thus, as the pernicious effect of false testimony, turning the people's temple of justice into a legalized "den of thieves." And the disastrous effects

are largely increased when the testimony is only partially false. It is then all the more deceptive. As Colton says: "Falsehood is never so successful as when she baits her hook with truth; and no opinion so fatally misleads us as those that are not wholly wrong, as no watches so effectually deceive us as those that are sometimes right."

That it is difficult to obtain convictions in perjury prosecutions, as it is claimed, is no valid reason for not attempting it; for the difficulty, if any exist, is not due, as in the case of some other crimes, to the fact that the people are adverse to the enforcement of the measures provided by the law for its prevention, but rather to the fact that there is so little said and done about it by those who are in command, that the great majority seem to think there is no redress for the great wrong done, save in a few exceptional cases. There is no predilection on the part of the people at large, in my opinion, to uphold or wink at the commission of this crime. The element of self-preservation in man prompts him in most cases to be in favor of the enforcement of prevention laws. Many of our citizens engaged in the liquor traffic, resent restriction laws thereon as an infringement of their rights, and I do not fear contradiction when I say that the failure of justice in many cases of prosecution under the liquor laws of the state, is due to wilful perjury. But while you will find plenty of sympathy for the person who is being prosecuted for a violation of the laws touching the saloon, I doubt whether you will find much of it wasted upon the villainous perjurer by whose false testimong the other evaded punishment.

It is obvious that any reform which will tend to prevent the commission of this crime and limit its damaging influence must be inaugurated, kept alive and pushed forward by the courts and judges of the commonwealth. Through their agency, and in no other way, does it seem possible. The legislature will follow with further laws, if deemed necessary, but it is not in a position to take the lead. Its members are not always on the ground, and do not hold the same commanding position as those who are at the head of the courts, the arenas in which the battles must occur. To those who are daily brought face to face with the evil, it must be given to invent and enforce measures to overcome it. No one else will so clearly see the necessity, and no other is in so good position to successfully carry on the reform.

We have, perhaps, at present, all the legislation necessary on

this subject. The statute provides:[1] "Whenever it shall appear in any court of record, that any witness or party who has been legally sworn and examined, or has made an affidavit in any proceeding in a court of justice, has testified in such a manner as to produce a reasonable presumption that he has been guilty of perjury therein, the court may immediately commit such a witness or party, by an order or process for that purpose, or may take a recognizance with sureties, for his appearing to answer to an indictment for perjury, and thereupon the witnesses to establish such perjury may, if present, be bound over to the proper court, and notice of the proceedings shall forthwith be given to the prosecuting attorney. If, in any proceedings in a court of justice, in which perjury shall be reasonably presumed, as aforesaid, any papers, books or documents shall have been produced, which shall be deemed necessary to be used on any prosecution for such perjury, the court may, by order, detain the same from the person producing them, so long as may be necessary in order to their being used in such prosecution."

It will be noticed that the people have entrusted this power to the courts of record when the witness "has testified in such a manner as to induce a reasonable presumption that he has been guilty of perjury." The court is further assisted by placing under his control, the witnesses, papers, books and documents necessary to be used on the prosecution for such perjury.

The statute also provides:[2] "Every person who shall be guilty of subornation of perjury, by procuring another person to commit the crime of perjury, shall be punished in the same manner as for the crime of perjury." And:[3] "If any person shall endeavor to incite or procure any person to commit the crime of perjury, though no perjury be committed, he shall be punished by imprisonment in the state prison not more than five years, or imprisonment in the county jail not more than one year." Dissuading a witness from giving testimony, and the mere attempt to stifle evidence, though without success, are both misdemeanors and punishable as such.

I am persuaded that but comparatively few people are advised as to the extent and far-reaching effects of these provisions. If litigants and their agents had them always in mind, the crime of

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1 How St., §§ 9239, 9240.
2 How. St., § 9237.
3 How. St., § 9238.

perjury would be of rare occurrence, and would scarcely ever be committed by any one not interested in the subject matter of the litigation.

It seems desirable therefore:

1. That the circuit judges unite in a determination to see to it that no one shall give testimony in their respective courts until he clearly understands the nature of an oath, is cautioned against its violation, is fully instructed as to the intent and extent of the penalty therefor, as well as the power of the court in the premises, and his determination to exercise the same if condition requires it.

2. That the supreme court be requested to formulate and adopt a rule for the circuit courts, requiring the clerk of the court, as may seem best, to caution the witness at the time the oath is administered, such rule to provide a form that may be used. This cautioning of witnesses is said to be used in several of the states, and is required in taking depositions in the courts of the United States.

3. That the circuit judges determine that they will, in all proper cases, exercise the power given them by the law to the end that the evil resulting from perjury be reduced to the minimum, and that they will respectively take all proper means of having their determination known of all men. There would be great moral force in this position, and but a short time would elapse before society would be permeated with the notion. Attorneys, litigants, witnesses, jurors and all others who visit our courts, would be so many avenues through which it would be known, and newspaper comments, from time to time, would give it wide circulation. It would be hailed as a blessing by the right minded, and would have a wholesome effect on those who meditate evil.

Witnesses constitute the most important part of the machinery in courts of justice. They are the avenues through which the court recives information upon which to base its judgments. Testimony is the life-blood of the judicial system. When it is pure, we may confidently hope for substantial justice. But when it is corrupted by the poison of falsehood, it causes the system to decay and become as a "whited sepulchre," fair without, but within full of skeletons of the dead rights and hopes of human beings.

Let us make a determined fight in this regard, for the rights of humanity, and I am persuaded that our efforts will be amply rewarded.

NOTES.

A CORRECTION.—By an important error in proof reading, the Hon. Claudius B. Grant, in his article upon "Circuit Judges and the Criminal Law," in the January number of this journal, was made to use the word "beer-garden," and as a result weakened the force of his sentence. The word was written "bear-garden,' by him, but was mis-read by the compositor, and as often occurs, even in the best regulated publishing offices, the error escaped the eye of the proof-reader. Such mistakes are as embarrassing to us as they are offensive to our contributors.

PRACTICE COURTS IN LAW SCHOOLS.—The *Chicago Legal News*[1] has this to say of the new system of practice courts now being established in the leading law schools: "The law schools of the country and especially of the west are paying more attention this year than ever before to actual legal practice. Students are taught every step in a lawsuit from its commencement to its termination by actual practice, and as a consquence when they graduate it means something; they are ready for business. Theory and practice should go hand in hand and be taught together." It is gratifying to note that the law department of our own state university was one of the very first to establish such a system and carry it into successful operation.

OWNER OF BREWING STOCK NOT A BREWER.—Under the recent decision by Judge Kinne, of the twenty-second judicial circuit, in *Tillman v. Great Camp, Knights of the Maccabees*, one may own brewing stock and still not be considered, in any legal sense, a brewer. The plaintiff sought to recover two thousand dollars insurance on her husband's life. Payment was refused upon the ground that the assured, by purchasing stock in a brewing company, had violated the rules of the organization, which prohibited proprietors, agents or employes of manufacturers or sellers of intoxicating liquors from membership. The trial judge held, however, that the purchase and holding of brewery stock did not make him a principal in any way, and therefore the right to the insurance had not been forfeited.

THE INFLUENCE OF THE JUDGE'S CONVENTION.—Judge Russell, the president of the recently organized association of circuit judges, evidently did not attend the meeting of judges for

[1] Vol. 26, p. 172 (Jan. 20).

the purpose of taking part in brave discussions and listening to powerful words as to the duties of circuit judges, and then going home to his circuit to drop into the same old rut. It is refreshing to learn that the vigorons president has profited by contact with his brethren and commenced at once to upset traditions and inaugurate reforms. At the opening of the January term of the circuit court of Muskegon, Judge Russell read the riot act to the jurors. He criticised the work of the retiring bench severely and gave the incoming panel to understand that hereafter he should see that the business of the court was promptly and honestly attended to. In the course of his remarks he said: "The practice by juries of reaching decisions at night, when overtime must be paid, and imposing on the county by increasing their own pay and by causing extra expense in juror's fees and board bills must be stopped." The judge asserted that in every case tried since the first of January he had been called out at night to receive verdicts, and he intimated that if this practice continued it was his intention to feed the jurors on bread and water or discharge them entirely.

What the people want and what the profession needs, is more judges with the courage of Judge Russell.

MR. JUSTICE BROWN ON CODIFICATION.—W. H. H. Russell's article, "California System of Codes,"[1] continues to attract attention. Mr. Russell has received the following letter from Mr. Justice Brown, of the U. S. supreme court, which will be as interesting to the profession, as it is complimentary to Mr. Russell:

"MY DEAR SIR:—I have just read with great pleasure your paper upon the California system of codes, published in the July number of the MICHIGAN LAW JOURNAL. It is really a most interesting resume of the question of codification, and is a strong argument in favor of codification in this country, which seems to have been quite successful in all the states where it has been adopted. I am by no means as much opposed to a code of civil procedure as most lawyers who have been engaged in the common law practice in Michigan, although there is a great deal to be said in favor of the present system as one to which the bar has become accustomed. My principal fear is that the adoption of a new code might necessitate the argument and decision of a very large number of questions of practice, which, under the present system, were long ago settled. While this might be a good thing for the profession it strikes me that it might bear somewhat oppressively upon litigants I do not feel sure that pleadings under the code are so much simplified as is claimed, or that second amended supplemental answers which we occasionally encounter on appeals from Texas, are really much worse than a sur-rebutter or sur-rejoinder at common law.

"However, do not understand me as having any serious objection to a code of civil procedure, which doubtless has its advantages. Your article will at least serve to set the question in motion.

"Very truly yours,

"W. H. H. RUSSELL, ESQ. H B. BROWN."

[1] 2 Mich. L. Jour., 279.

DISBAR THE SHYSTERS.—The Grand Rapids bar, in the case of Frank S. Donaldson, convicted of defrauding a client, have a chance to do a little towards removing the stigma which laymen and the press have of recent years placed upon the profession of the law in this country. The word lawyer used to stand for a profession in which honor, integrity and honesty were the chief virtues. But now, as if to contrast the attorney of the present with the lawyer of earlier times, the phrase "the old school lawyer," has become a synonym for learning, polish, courtesy and uprightness. Nowadays entrance into the profession has become so easy and the morals of the profession so lax that the real lawyers are far outnumbered by the shysters, pettifoggers and pirates who masquerade under the name of "attorney-at-law." unfortunately for the standing of the noblest of the professions, a too hasty public has held the profession of the law as an entirety as responsible for the evil deeds of those conscienceless men who, through the loose and inefficient requirements for admission to practice that obtains in this country, have been enabled to defraud luckless clients and to do their worst to render the administration of justice a farce.

The case of Donaldson, a Grand Rapids alleged lawyer, is one in point. He was convicted, after a fair hearing, of having misappropriated a client's money. He accepted a note of $400 for collection, and having collected the full amount turned over $100 to his client and retained the balance. The judge with commenkable promptness sentenced him to pay $500 fine and to serve one year in prison. Another Grand Rapids attorney, Benjamin DeVries, is accused of forging a deed conveying a piece of property to himself, placing the deed on record, and raising a considerable sum of money by mortgaging the property. His trial has not been concluded as yet, and we cannot, therefore comment upon the case. The duty of the Grand Rapids bar is clear in the case of Donaldson. He should be disbarred. The confidence of the public in the profession will be weakened unless this is done at once. The tribe of shysters and legal tricksters—and they are numerous in the large cities of our state—should be weeded out as fast as pretexts arise for disbarring them. And if the profession should ever be cleansed, the requiryments for admission, both as to learning and especially as to morals—for learning without good morals is even more dangerous than ignorance without any morals—should be raised so as to be an effective bar to all degrees of pettifoggers.

JUDGE TAFT'S DECISION IN THE CELEBRATED STREET RAILWAY CASE.—Probably the most important decision ever announced in the circuit court of the United States for the eastern district of Michigan, was handed down by judge Taft, January 31. It was in the case of *Detroit v. Citizens Street Railway Com-*

pany, and is a signal defeat for the street car company. The litigation has been a long one, and has been prosecuted thus far to a finish by the persistent and determined mayor of Detroit. The court says: "That the city had no power to grant a vested right in the streets except as it was confirmed by the statutes of the state of Michigan in force at the time being; that the matter was not *res adjudicata*, as had been claimed. that the city was not equally at fault with the railroad company in its standing." He further holds that an ordinance extending the life of the company beyond the statutory period of thirty years is void, and that there cannot be acquiescence in a void act—therefore no estoppel. That in order to establish estoppel against the city, the defendant must show that there has been conduct on the part of the city equivalent to a new grant; that the statutory restriction upon the mode by which the city can make a street railway grant precludes the theory that the city is estopped to deny a grant in the streets made in any other manner than an ordinance duly enacted for that purpose.

This decision is a hard one for the railway company, as it has expended $480,000 since the suit started in equipping and extending its lines, but the particular hardship did not blind Judge Taft in his exposition of the law. It has been claimed by the city that these large expenditures were made by the defendants for the very purpose of establishing their right to the use of the streets, in which purpose they have signally failed. The city of Detroit is enjoined from taking any action under the decree for three months, at the expiration of which time the street car company must vacate the streets, unless Judge Taft's able decision is overruled in the appellate court. A final determination of the litigation can be had next May before the court of appeals.

While this is not a leading case, it certainly emphasizes a principle of law, which in these days is the only safeguard of the public against the grasp and greed of corporate power and influence. In spite of the most formidable array of attorneys that has contended for a single client in many years in this circuit the city of Detroit has won, and for the victory the thanks of the public are first due Mayor Hazen S. Pingree, and Prof. C. A. Kent. and the Hon. Benton Hanchett, who conducted the suit for the city.

BUSINESS METHODS FOR LAWYERS.—Some time ago the *Lawyer and Credit Man* offered prizes for the best articles upon this subject. Of the many who contributed articles Mr. George Clapperton, of Grand Rapids, was the successful author. The introductory paragraph to his article is as follows: "This is eminently a business age. The days of the 'circuit rider' have passed away, and the successful lawyer of the present day must engage largely in business practice and be a practical business man. If he be worthy, varied and important business interests

are entrusted to his care and skill, and intellectual ability and legal learning are not sufficient to enable him to properly discharge his trusts and do justice to himself and his profession. The distinction between the professional and the business man is growing less under our system of education and a happy combination of the two is now essential in the practitioner of the law. The habits of application, method, accuracy, punctuality and dispatch are as necessary to the success of the lawyer as to the so called business man. While many do possess such habits, there is among lawyers in general a deplorable lack of correct business habits, and an inadequate conception of the practical value of method and system in the conduct of their business. It may be said, that as a rule the modern lawyer does not have the business methods or the ignominious love of details that characterize the successful man in other vocations and the lack of which is ruinous to any business. The subject of 'Business Methods for Lawyers,' is therefore a timely and important one and entitled to the careful consideration of the legal profession, particularly the younger members. By the general adoption of such methods the business of the profession, especially along the commercial lines, would unquestionably be increased."

There is a great deal of truth in what Mr. Clapperton says. Regret the fact though we may, it is none the less true that the practice of the law is becoming more and more a business, and less and less a profession. The old saying, "the law is a jealous mistress," is no longer construed to mean that the aspirant for her favors must court her constantly along fixed and unyielding professional lines. The successful practitioner no longer holds himself aloof from the business world. Though it may be his choice to confine all his thought and action within his office, the library and the court room, yet necessity compels him to do otherwise. To get business he must be interested in business, and know business methods. To gain and hold a client he must, as a rule, be known to have a thorough knowledge of the particular business. Very frequently it is found to be good policy to become interested in it to some extent, financially. A thorough business education and a knowledge of practical business methods is therefore most essential.

CHRISTIAN H. BUHL'S BENEFICENCE.—University of Michigan authorities, students, alumni and friends, have just enjoyed the novel and pleasant experience of receiving, through the medium of the board of regents, a gift of $10,000 by bequest under the will of the late Christian H. Buhl, of Detroit, to be used in enlarging the library of the law department of the university. This bequest is of greater significance to the university than its size would seem to indicate. Citizens of the state of Michigan have not been accustomed to devising sums of money to our

great educational institution, and such gifts as those of Mr. Buhl mark rare epochs in its history. The reason for the scarcity of such gifts is that our wealthy men have not been educated to the idea of making them. Mr. Buhl has set an example which we hope may prove contagious. There is an abundance of wealth throughout the state tied up in great fortunes which needs but the suggestion of such generous bequests as Mr. Buhl's to turn some of it in the direction of our university. The people of Michigan seem to be possessed with the idea, because the university is a state institution and supported by a fund raised by taxation upon all the property of the state, that private donations would not be appreciated and would be swallowed up in the general fund. A familiarity with the finances of the university would dispel any such impressions. The people of the state, through their representatives at Lansing, although far from illiberal and inappreciative do not seem to fully grasp the real needs of the university. The legislature is a very unsatisfactory body to deal with when appropriations are needed, and the result has usually been that the plans for developing special departments are handicapped or rendered ineffective by the want of financial backing. There seems to be but little appreciation, throughout the state, of the wonderful growth of the university. The increased demand upon the general fund has left nothing which the regents can utilize for the development of those new features which the progress of educational work in this country compels them to adopt in order to keep the university in the front rank as one of the leading and progressive seats of learning in the country.

So it is that Christian H. Buhl's donation is a matter of much significance to the university as a whole, as well as a special blessing to the law department. The law department, of course, is to be especially congratulated upon its good luck. Mr. Buhl made a wise selection in choosing the law library as the object of his gift. It has become evident to an observer of the progress in the methods of legal education, that greater demands are being made upon the law library than ever before, and the more complete the library the better the facilities for teaching the law. Our library is one of the finest among the leading law schools and this addition to its fund will enable the authorities to equip it as completely as any in the country.

LAW SCHOOL NOTES.

E. F. JOHNSON, EDITOR.

H. C. WALTERS, ASSISTANT.

Richard Kitchens, '95, was married during the holidays.

The Board of Regents are asking for estimates for the completion of the Waterman gymnasium.

There is talk of having a debating contest between the law and literary departments of the university.

Victor J. Obenaur, a prominent member of the class of '95, has left the department to return in October.

It is stated on good authority that a summer school will be started here at the close of the present college year.

D. R. Barlow, '94, has gone to Butte, Mont., where he will enter into partnership with an attorney who is thoroughly established.

Prof. Otto Kirchner, ex-Attorney General of Michigan, began a course of lectures during January to the classes of the department not before included in the curriculum, viz: private international law, and marital rights.

The students are much pleased with the practical nature of the work in wills, code and criminal pleading. Besides the regular text-book and lecture work they have been required to draw up papers, such as wills, petitions, answers, demurrers, orders, etc.

At the last meeting of the regents of the university a resolution was adopted prohibiting members of the board of regents from having any financial or professional business with the university by which he shall receive any pecuniary reward or compensation out of the funds belonging to the university.

Judge Cooley lectured in the chapel, Jan. 16 and 18, on Corporations to large audiences, composed of Prof. Adams' classes in Political Eeconomy, members of the faculties and others. The lectures were highly instructive and equally interesting. It may be mentioned that the Judge considers governmental control of railways impracticable.

Mr. W. W. Wademeyer, a member of the senior class in the literary department, and a junior in the law department, has been selected as the representative from the univereity to give a twenty minute address at one

of the meetings of the Union League Club in Chicago on the 22d of February. Though this is a high honor conferred upon Mr. Wademeyer, all agree that it is not greater than he deserves, and that he will do credit to the university as its representative.

The Webster society will discuss the following subjects by way of preparation for the inter-collegiate debate: *Resolved*, That the American form of government is better than the English form of monarchical government; affirmative, Messrs. Kimball, Obenaur and Hathorn; negative, Messrs. Bailey, Sims and Harvey. *Resolved*, That organized strikers should be punished as conspirators; affirmative, Messrs. Chambers, Downing and Eckles; negative, Messrs. J. H. Mays, Fenier and Patton.

RESOLUTIONS ON THE DEATH OF C. H. BUHL.—A committee of the law department has drawn up the following resolutions in memory of the late Christian H. Buhl:

WHEREAS, By a decree of the Judge of the Universe, Christian H. Buhl, of Detroit, has been removed by death, and

WHEREAS, We recognize the friendship which he has long manifested towards the law department of the University of Michigan which renders it highly proper that we should place on record our appreciation of his services and gifts to this University and humanity; therefore be it

Resolved, By the law department of this University, that while we bow to the will of the almighty in humble submission, we none the less mourn for him who has been called from labor to rest; and further be it

Resolved, That this department loses a faithful friend; one always active in making the world happier and better, and ever ready to aid the needy and distressed.

Resolved, That as beneficiaries of this noble man, as the followers of his noble life, we tender to his family our heartfelt sympathy in this hour of their affliction.

Resolved, That a copy of these resolutions be sent to Detroit and Ann Arbor papers for publication, and this original be entered upon the class minutes.

Resolved, That his portrait in the law lecture room be draped in mourning for a period of thirty days as a mark of respect.

TO-WIT: THE LAW DEPARTMENT ANNUAL.—The seniors of this department have at last decided to publish an annual, and a board has been organized for that purpose as follows: Chas. A. Denison, editor in chief; Earl D. Bapst, managing editor; Oreon E. Scott, business manager; B. F. Wollman and F. C. Kuhn, assistant business managers. E. W. Sims, H. C. Walters, G. W. Fuller, C. A. Park, and Eugene Batavia, editors. The following general committees have been appointed: General literature, Messrs. Sims and Denison; drawings and engravings, Messrs. Wollman, Walters and Fuller; college organization, Messrs. Park and Batavia; record committee, Messrs. Bapst and Waters; fraternity committee, Messrs Kuhn and Park. The faculty advisory board consists sf Profs. Knowlton, Mechem and Thompson.

The legal word or phrase "To-wit" has been chosen as the name of the publication. The book will contain, among other things, a history of the department, same of the class; record of each member, here and at other colleges; an illustrated sketch of the practice court, literary matter

of miscellaneous character, cuts of the faculty, buildings, etc. An endeavor is being made to have Judge Cooley write the history of the department, which it is hoped will prove successful. Prizes will be offered for the best article, humorous or otherwise, on "To-wit," also for best literary sketch of a general nature. The book will cost in the neighborhood of fifty cents a copy. Members of the class are enthusiastic over the project and promise faithful support. It is understood that the proceeds left over from the sale of the book, if there be any, will be used for the purpose of leaving a class memorial of some kind—perhaps a drinking fountain, if this can be done. The class of '94 will stand at the head of the list in so far as distinguishing itself in the line of such class work is concerned.

THE PRACTICE COURT.—For the new practice court a splendid court room has been fixed up in the old quiz room. There is a railing extending from the entrance to the room, across in front of the seats for the spectators, just as in a regular court room. Within this railing is the judge's bench, clerk's desk, jury box, raised seat for the witness, sheriff's table, and a table and chairs for the attorneys. In the next issue an account will be given of the actual working of the court. The clerk, Miss Eaton, says that there are a number of cases ready for a hearing, and as some 150 cases will have to be disposed of the work will be pushed on rapidly. In order to show the relation which the practice court bears to the department the following extract is taken from the court rules, (drafted by Prof. Mechem):

Purpose.—The purpose of the practice court is to afford to students of this department practical instruction in pleading both at law and in equity, under the common law system and the "reformed" or "code" procedure, and actual experience in the commencement and trial of cases through all their stages.

Organization.—The practice court is a part of the department. Its work is done under the supervision of the faculty as one branch of the instruction given in the department. It will be under the general supervision of one member of the faculty, but all members of the faculty will co-operate in conducting it. It will sit in one or more sections as the exigency of the work may require. A supreme court, consisting of two or more members of the faculty, will sit at stated times for the review of errors committed by the trial courts. The officers of the court will be the presiding judge, the clerk and the sheriff and such deputies as may be necessary. The clerk shall be appointed by the presiding judge, and shall hold the office at his pleasure. The sheriff, deputy clerks and deputy sheriffs shall be appointed from the students by the presiding judge from time to time, and shall perform the duties as part of the work of the department. The clerk shall be *ex officio* clerk of the supreme court, and of all sections of the practice court.

Procedure.—For the purpose of this work the class will be divided into sections, and the work of attorneys, witnesses, jurors and the like will be performed by the students. A member of the faculty will preside at these trials, which will be conducted with all the dignity and decorum of actual practice. Upon the satisfactory completion of the course, credit will be given for it. Every member of the senior class who is a candidate for a degree will be expected to take part in both courses, and to perform all the incidental duties which may be required of him. Satisfactory completion of both courses will be a condition precedent to a degree.

MONTHLY DIGEST OF MICHIGAN DECISIONS.

BILLS AND NOTES—When suit may be brought without possession.—A negotiable prommissory note may be sued upon even though it is in the hands of a third person, if plaintiff gives good reasons for not producing it. Hail v. Rathbone. Montgomery, J.

BILLS AND NOTES—Accommodation indorser—Securities, to whom pass.—Where a party indorses a note for accommodation only, the note being executed in his favor, but for the use and benefit of the maker, any securities, such as mortgages, etc., which such accommodation indorser may hold to secure him on such indorsement do not pass to the indorser, but remain the security of the payee. Burt v. Gamble. Hooker, J.

BILLS AND NOTES—Suit by indorsee—Consideration—*Bona fide* holder—Burden of proof.—An indorsee's position in suing upon a promissory note, is not impaired by proof simply that the instrument was executed without consideration as between the parties, and he may still rest his case upon the instrument itself, from which it will be presumed that he acquired it in a manner entitling him to stand upon the vantage ground of a bona fide holder for value. Little v. Mills, et al. Montgomery, J.

CHATTEL MORTGAGE—Exempt property—Lack of wife's signature—Fraud—Estoppel—A chattel mortgage executed by the husband alone and including exempt property is void only as to such exempt property. The mortgagor, if a party to the fraud, is estopped from attacking the mortgage on that ground. Watson v. Mead, et al. Hooker, C. J.

CONTRACTS—Misrepresentation—Acquiescence.—Where two persons enter into a contract with a third party, and one of the first parties informs the third person that the first two are in partnership, and this is not denied by the other first party, and is acted upon by such third person in good faith, the acts of one of the first parties in relation to such contract will bind both. Cook, et al., v. Blake. Montgomery, J.

CONTRACTS—Liability for acts of co-tenant.—Where two parties owned timber in common and entered into a written contract with a third person for the cutting and removing of said timber, and an oral agreement is made between the first parties that one of them shall have charge of their interest in the business, they are both bound by such co-tenant's acts, though no mention of such oral agreement is made in the written contract. Saxton v. Pells, et al. Hooker, C. J.

CRIMINAL LAW—Recognizance unlawfully extorted.—Where there is a general jurisdiction to let to bail, and a recognizance is accepted, if it is claimed that such a recognizance is extorted from the prisoner in violation of his right the fact should be set up in his defense. People v. Robt, et al. Montgomery, J.

ESTATES IN EXPECTANCY—Acquiring of fee simple by purchase of outstanding interest.—Expectant estates are descendable, devisable and alienable in the same manner as estates in possession; and where one holds an estate in expectancy and purchases the outstanding interest, the whole estate becomes vested in him in fee simple. Hovey v. Nellis, et al. Grant, J.

EVIDENCE—Testimony in former trial, how proven.—Witness cannot be questioned as to what another person testified at a former trial, unless such person is made a witness on this trial and the foundation laid for such testimony. Michigan Savings Bank v. Estate of Cutler. Montgomery, J.

LIFE INSURANCE—Accidental death—Burden of proof—Evidence.—The burden of proving accidental death is upon the plaintiff, and where several theories are advanced, some consistent, and some inconsistent with accidental death, a prima facie case is not made out until some proof is offered tending to establish a theory consistent with the theory of accidental death. Merreth v. Insurance Co. Hooker, C. J.

LIFE INSURANCE—When contract for insurance complete—Hazardous occupation—Presumption of waiver of clause in policy—A contract of insurance is completed as soon as the application is accepted by the company. Where an insurance policy recites that getting on and off moving trains are hazards not covered by the policy, and the company insures a railway conductor, knowing him to be such, and a part of whose business, as is a matter of common knowledge, is getting on and off moving trains, they are presumed to have waived the clause. Daily v. Insurance Co. Long, J.

MASTER AND SERVANT—Superior servant—Negligence—Liability of master.—Where a master delegates to a superintendent full power to manage a business and employ and discharge servants without interference, such superior servant, in whatever he does in furtherance of the business and operations he has in charge, stands in place of the master, and the negligence of such servant or servants is the negligence of the master, Shumway v. Walworth and Neville M'f'g Co. Montgomery, J.

MUNICIPAL OFFICERS—Removal from office—Grounds for removal—Misconduct in another office—Writ of prohibition.—Under the constitution the legislature may provide for the removeal of municipal officers. The body or officer provided with such power to remove acts in a quasi-judicial capacity and the method of procedure must be of a quasi-judicial character. Such officer or body then becomes an inferior tribunal amenable to the writ of prohibition when acting in excess of the jurisdiction conferred. There is no provision in the constitution, nor in the laws, which prevents a person from holding office because of misconduct in another office which he held prior to the one to which he was elected or appointed. Speed v. Common Council of the City of Detroit. Grant, J.

NEGLIGENCE—Contributory negligence.—If a person use such precautions as an ordinarily prudent man would use under like circumstances, in view of the probable danger of injury, he cannot be held to be guilty of contributory negligence. McDuffie v. L. S. & M. R'y Co. Long, J.

NEGLIGENCE—Evidence.—Negligence cannot be shown by one who has no personal knowledge of it, and the testimony of a witness that he "guesses" so and so is of no value and should not be considered. Johnson v. Haley. Long, J.

SALE—Acceptance—Effect of acceptance of partial consignment.—Where a certain lot of goods are sold to be delivered in consignments, the acceptance of the first consignment by the purchaser binds the sale of the whole. Gilbert, et al., v. Lichtenberg. Long, J.

SCHOOLS—Taxation to support graded schools—Construction of statute.—That portion of How. Stat. § 5052, subd. 6, relative to taxing of

property outside the 2½ mile limit for building school house, cannot be construed to hold that persons beyond the 2½ mile limit are to enjoy enlarged school privileges to be found in districts where the schools are graded and advanced branches taught, without being subject to the burden of aiding in their support. Keweenow Association v. School Dist. No. 1 of Township of Hancock. Hooker, C. J.

TAXATION—Assessments, etc.—Presumption as to validity.—The presumption is that the commissioners and officers in making tax district assessments act in good faith, and unless mistake or abuse of discretion is manifest, the determination of the officers in whom such discretion is vested is conclusive, and is not reviewable by the courts. Powers v. City of Grand Rapids. McGrath, J.

TAXATION—Failure of supervisors to examine returns—Presumption as to validity—The failure of the board of supervisors to examine the returns of the township in tax matters, and to hear disappointed parties, is but an irregularity at most, and therefore the presumption is that such taxes are valid. State v. Hill. Hooker, C. J.

TAXATION—Pipes of water company, when to be taxed as real estate.—The pipes of a water company, if attached to the power house being situated upon the land of the company, are realty even though they run for long distance through the lands of other parties, and consequently cannot be taxed as personalty by an adjoining township through which they run. Monroe Water Co. v. Township of Frenchtown. Long, J.

TROVER.—Demand and refusal—Conversion.—The object of proving a demand and refusal, or neglect to deliver upon demand, is to establish a conversion. They do not constitute the conversion, but are evidence of it. Crosier v. Patrick. Hooker, C. J.

BOOK REVIEWS.

COOK ON STOCK AND STOCKHOLDERS AND CORPORATION LAW. A Treatise on Stock and Stockholders, Bonds, Mortgages and General Corporation Law, as applicable to Railroad, Banking, Insurance, Manufacturing, Mining, Telegraph, Telephone, Express, Gas, Waterworks, Commercial, Turnpike, Bridge, Canal, Steamship, and other Private Corporations. By WILLIAM W. COOK, of the New York Bar. Chicago: Callaghan & Company, 1894. Third edition. Two vols., 8vo. 2275 pp. $12.00 net.

The well known remarkable success of this work can in a measure be accounted for when so eminent an authority upon the subject as David Dudley Field says of it: "It is a better book than any I know treating these subjects." This is a broad and sweeping assertion, but we have not the slightest doubt the venerable jurist meant every word of it. Among the law books that have attained success upon grounds of merit only this work will unquestionably hold a prominent place. Considering the rapid growth of corporate enterprises, and the increase of litigation which would naturally be expected, it is not at all surprising that this edition is in two volumes. There are "padded" law books, which, if there is any excuse for their existence at all, do not deserve the two volume space they fill. This will never be justly said of Mr. Cook's work. He says in his preface that this edition contains double the amount of material found in the second edition. After carefully comparing the two editions no one would doubt the truth of the assertion. It is interesting to contemplate the possibilities for future editions, however, when four years affords such an increase of the volume of the law upon one branch. The author is quoted by the publishers as saying: "I do not see how any subject can arise concerning corporations not treated in some form in this third edition." Quite a careful study of the work has convinced us that this assurance is perfectly warranted. Here are a few proofs of the justifiableness of the claim, taken from our own short experience with the book. Since its arrival at our table we have had occasion to look up three questions upon the branch treated. The first was as to a stockholder's liability to corporate creditors upon unpaid subscriptions. Turning to chapter XI the question was found to be answered in a very satisfactory manner. The next question was as to the manner of the enforcement of contribution among shareholders. Though this was not nearly as satisfactorily answered, it was found to be treated in the last section to chapter XII and the last case cited under the chapter, and referred to in the last note, was found to be almost exactly in point. The citation is the N. E. Rep., the volume and page of the official report not being given, although the decision was rendered so long ago as 1889. There are quite a number of similar instances throughout both volumes. It would seem that the practical utility of the work might have been enhanced by the addition of the citation to the official state reports. It is often preferred to cite these rather than the reporters. The next point we sought information upon was the power of corporations to prefer creditors. The power of an insolvent corporation to prefer its own directors is found fully discussed in section 661. In sec-

tion 691 the power to make preferences generally is considered. In the notes to this section some important decisions are correctly cited. The statement of the law in the text is short indeed; the whole question being disposed of in two or three sentences. The plan of the work throughout seems to be to give a general statement of principles of law in the text, and a more exhaustive treament and examination of the cases in the notes. It would seem, however, that upon this point too little attention is given in the text. The power to make preferences, and give mortgages in anticipation of insolvency, is now frequently a question for judicial determination, and upon it great financial interests usually depend. In this instance, as in the others referred to, the law though briefly stated seems to be correctly stated—our esteemed contemporary, the *American Law Review*, to the contrary notwithstanding. The opinion of the author seems to be in line with the large majority of the decisions of the best courts, especially the federal courts. Two very recent decisions,[1] rendered since the publication of both this book and Judge Thompson's able article were written, sustain the views expressed in the former rather than the latter. These practical tests of the work may be considered a very fair index to its efficiency. It is doubtful whether we would be able to find any other faults with the work than those mentioned should we set out with that particular purpose in view.

The new material added is so extensive, covering so many new and important subjects, that it seems more like a new work than a new edition of an old one. There have been added entirely new chapters treating thoroughly the laws peculiar to gas, electric light, telegraph, telephone, street railways, railroads, plank-roads, and other corporations owing a duty to the public, or "quasi-public" corporations. To the chapters on reorganization, receivers, bonds, mortgages and foreclosures, important new matter has also been added. The chapter upon "watered" stock, which the author gives quite exhaustive treatment, has been re-written into an interesting chapter of 47 pages. This will be of particular interest just now, when the promoters of so many corporations are called upon to defend themselves of the charge of resorting to that practice; a prominent example being the American Bell Telephone company, whose application to increase the capital stock from $30,000,000 to $50,000,000, its enemies allege has been made for that very purpose. The chapters upon corporate meetings and elections has been re-written; as have also those upon dividends and preferred stock. Another new feature of this edition, which must not be unnoticed is a comprehensive synopsis, occupying 350 pages of closely printed matter, of the constitutional and statutory provisions of the various states so far as they affect corporations. Last, but not least in importance, by any means, is the well-constructed index of 117 pages.

On the whole one cannot but be very much pleased with the work. In manner of arrangement and typographical appearance it is a perfect modern law book.

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[1] Hollins v. Brierfield Coal & Iron Co., 14 Sup. Ct. Rep., 127; Hospes v. Northwestern M'f'g Co. (Minn.), 50 N. W. Rep., 1117.

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HIGH SEAS.

ALFRED RUSSELL.

Law is progressive, not stationary. Complete criminal as well as civil jurisdiction over the Great Lakes has finally been established in the federal courts. The writer views this consummation with satisfaction because he has contended for this doctrine during the last thirty years.

It was long before even civil jurisdiction was declared. In *Allen v. Newberry*,[1] which the writer argued, jurisdiction was declined because the vessel was employed in commerce between ports of the same state. The action was a libel in admiralty for breach of a contract of affreightment on Lake Michigan between Manitowoc and Milwaukee. The court, to use a phrase of Mr. Webster, "pitched the power on the wrong location;"—on the commercial clause of the constitution and not on the admiralty clause. The point was not mentioned during the argument by either the court or counsel; and the opinion affords an illustration of the danger of deciding a case, upon a point not raised and discussed, without directing a re-argument. In a case in the same volume, which the writer argued, where the shipment was between Buffalo and Milwaukee, jurisdiction was exercised without comment.[2]

In *Newberry's Case* it was said that the act of congress of Feb. 26, 1845, in regard to the jurisdiction in admiralty upon the Lakes, restricted it to interstate commerce, (and was not based upon the character of the waters). It was also said that the act was merely declaratory of the law existing independently of that status. This supposed restriction had been previously noticed as

[1] 21 How., 244. [2] Propeller Niagara v. Cordes, 21 How., 7.

to the Lakes, in *The Genesee Chief*,[3] and even as to tide water in *New Jersey Co. v. Bank*.[4] But in the case of *The Propeller Commerce*, (occurring in the Hudson River)[5] the court went a step forward and declared that locality was the test of jurisdiction and not the employment of the vessel between the states. *Newberry's Case* was not cited, but it was referred to in the later case of *The Belfast*,[6] which repudiated the test of employment between states and placed cases of maritime contract and tort on the same footing. *Newberry's Case*, although criticised, was adhered to in *The Belfast*, on the point of basing the jurisdiction on the Lakes upon the act of 1845, and not upon the admiralty clause in the constitution, which clause was executed by the ninth section of the judiciary act of 1789, conferring the admiralty jurisdiction on the district courts. In *The Hine v. Trevor*,[7] the court, while conceding that the *Genesee Chief Case* has removed the imaginary line of tide water which had been supposed to circumscribe the jurisdiction, and while holding that admiralty jurisdiction on the great interior fresh water rivers of the continent rests upon the judiciary act of 1789, nevertheless declared that the jurisdiction on the lakes was governed and limited by the act of 1845. This is the more remarkable because in the *Genesee Chief Case* it had been declared that the Lakes were *seas*, and that all public navigable waters of the country were within the admiralty jurisdiction granted by the constitution. Cadillac, the founder of Detroit, had reported to his government, in 1701, that these bodies of water were *seas*.

At last the true logical result was reached in *The Eagle*,[8] where it was determined, (although the *Newberry* case was pressed upon the court), that the act of 1845 was not the foundation of the jurisdiction on the Lakes, and was inoperative and void; and that complete civil admiralty jurisdiction exists under the Act of 1789, Sec, 9 from the character of the waters as public and navigable.[9] Curiously enough the opinion was written by Mr. Justice Nelson, who wrote the opinion in *Newberry's Case*, in the 21st. Howard, and yet he declared that the doctrine of *The Eagle* had been the doctrine of the court since the 12th. Howard.

Unlimited civil jurisdiction over the lakes as *seas* having thus become established, the exercise of criminal jurisdiction by the

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[3] 12 How., 443. [4] 6 How., 392. [5] 1 Black, 574.
[6] 7 Wall., 641. [7] 4 Wall., 566. [8] 8 Wall., 15.
[9] Compare *Lord v. Steamship Co.*, 102 U. S., 541: *Ex parte Boyer*, 109 U. S., 632.

federal courts over the Lakes was merely a question of time. Plainly the Lakes having been held to be in truth *seas*, they must next be held *high* seas, for any great public way is a *high* way,—that is, open to be used by all on its borders. But the progress was slow. In *Tyler's Case*,[10] which the writer argued, it was held that manslaughter, committed on an American vessel on the Canadian side of the water-communication between Lakes Huron and St. Clair, was not within the crimes act of congress of 1857; and that, consequently, Tyler, who pleaded to an indictment in the St. Clair circuit court, Michigan, his former conviction in the U. S. district court, at Detroit, for the same offence, was rightly convicted in the Michigan court, because the federal court had no jurisdiction where he was previously convicted. The writer, in support of Tyler's plea, maintained that the Lakes and connecting water were *high seas*, within the meaning of the federal statutes concerning maritime crimes; and also that a crime committed on an American vessel in any port of the globe is justiciable here, because an American bottom is American soil. The writer subsequently took a writ of error to the supreme court of Michigan from the supreme court of the United States; but the attorney general of Michigan, Hon. Jacob M. Howard, agreed that Tyler should be pardoned, on condition that the writer should not prosecute the writ at Washington; and so Tyler was pardoned. Otherwise the point lately adjudicated by the court at Washington in the *Rodgers Case*, and referred to below, would have been presented there much earlier.

Bennett G. Burley's Case,[11] during the civil war, is next to be noticed. Burley, holding a commission from Jefferson Davis, president of the so-called Confederate States, authorizing him to seize and destroy vessels of the United States upon the Lakes, set out from the British province of Ontario as a base of operations, with an armed crew, and seized a private vessel of the United States belonging to a citizen of Michigan, on Lake Erie. Escaping back into Canada, he was extradited upon the application of the writer, employed by the state department for the purpose. The writer then caused Burley (who was brought into this district), to be indicted for piracy in the federal court under the act of congress punishing piracy on the high seas. The district court held Lake Erie not within the statutory words "high seas," and the writer was compelled consequently to prosecute Burley for a mere rob-

[10] 7 Mich., 161. [11] Unreported.

bery in the common pleas of Ottawa county in the state of Ohio, which county extended over the waters where the offence was committed. The jury disagreed under the charge of the Ohio court[12] that Burley was protected by the commission of a belligerent power. Had the decision in the *Rodgers Case*, mentioned below, been made when Burley was indicted, he would have received his just punishmeut in the federal court.

In *Henry Miller's Case*,[13] Miller had been convicted in the federal court of Detroit under the Act of July 29, 1850, punishing the offence of setting fire to a passenger steamer on the high seas. It appeared that Miller had set the "Morning Star" on fire, on her night voyage, on Lake Erie, from Cleveland to Detroit. The writer, then U. S. district attorney, argued the case for the prosecution. But the court, while lamenting the failure of justice in *Burley's Case* and in the (then) present case, granted a motion in arrest of judgment on the ground that Lake Erie was not within the act. It was impossible to establish the locality of Miller's crime within any county of Ohio or Canada, and so he went "unwhipt of justice," although the loss of life and property through his crime was frightful to contemplate. In *Ex parte Byers*,[14] District Judge Brown considered it "too clear for argument that the Lakes are not high seas,"

We now come to the culminating case just decided, *Rodgers' Case*, which is of inestimable value to the country in the administration of criminal justice. Rodgers was indicted in the federal court at Detroit under section 5346 R. S., U. S., for an assault with a dangerous weapon on a private vessel of the United States owned in Michigan, the "Alaska," then being on the Canadian side of the water-communication between Lake Erie and Lake St. Clair,—the strait commonly called the river Detroit. The defendant pleaded to the jurisdiction, and the case went to the supreme court of the United States upon certificate of division between Circuit Judge Jackson, who upheld the jurisdiction, and the district judge. The point presented for adjudication was, whether the term *high seas*, in the statute, included the lakes and connecting waters. The court, in a broad and statesmanlike opinion by Mr. Justice Field, decided in the affirmative. In a brief historical review it is shown that the oceans of the world have been subject to the claim of exclusive use by particular nations.

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[12] Miles, J. [13] Brown's Adm. Rep., 156. [14] 32 Fed. Rep., 406.

The popular notion that "high seas" mean only the ocean, is next noticed and it is shown that other waters than the ocean are within the term,—such as the Mediterranean, sometimes called an Italian lake, and connecting seas, the Baltic, the cradle of admiralty law, and waters east of it; and that the chain of our Lakes is far more important than the two corresponding chains of the above named seas in Europe. The language of the *Genesee Chief Case* and the *Lake Front Case* is then referred to, and the reasons for punishing assaults on vessels on fresh and salt waters are shown to be the same. Reference is then made to the fact that the word *high*, in one of its meanings, denotes that which is open, common, or public, as in the word *high-way*, signifying a public way or road. A brief view of the enormous tonnage and business of the Lakes is then given as throwing light on the intention of congress. It results in the judgment of the court that the term *high seas* applies to all open and unenclosed bodies of navigable water which cannot be measured by the vision, and which are free to all people on their borders, and that, when this recent act for the protection of those who navigate was passed, congress intended to protect those in vessels upon our vast inland seas as well as vessels on the ocean and other seas of the world.

Mr. Justice Field makes a felicitous quotation from Virgil as to the Mediterranean. A less dignified quotation from Byron may be made by one who has been in storms on Lake Superior:

> "There's not a sea the passenger e'er pukes in,
> Turns up worse breakers than the Euxine."

In the conclusion of the opinion Mr. Justice Field refutes the position taken in the opinion in *Tyler's Case* that the criminal law of a country can have no extra-territorial operation, and shows that there is an exception to this rule as well established as the rule itself, namely, that offences committed upon a vessel belonging to citizens of the United States in navigable waters anywhere, though out of the territorial limits of the United States, may be judicially considered when the vessel and parties are brought within our territorial limits. He cites this statement of the law by Mr. Webster, speaking for the government of the United States, in a communication to Lord Ashburton in 1842 in the celebrated case of "*The Creole.*"[15] Mr. Webster declared to Mr. Sumner in 1845 that this letter was, in his opinion, the best of

[15] VI Webster's Works, 306, 307.

any of his writings,[16] Accordingly, it is finally held in the opinion of the court, that the fact that the boundary line between the United States and Canada runs through the centre of the intervening waters, does not affect the jurisdiction of the United States over vessels of their citizens navigating on the Canadian side, and that the Lakes, being seas in fact, do not cease to be such because by local custom they are called lakes.

There is nothing in the decision derogatory to the jurisdiction of any state bordering on the Lakes. The same offence may be judicially examined in either jurisdiction.[17] In *Rossiter v. Chester*,[18] and in the opinion of Manning, J., in *Tyler's Case*, civil admiralty jurisdiction over the Lakes was denied. But in *Backus v. Coyne*,[19] the Michigan supreme court overruled the above, and declared the decision of the federal supreme court to be "now the universally recognized doctrine." So, undoubtedly, the doctrine of *Rodgers' Case* will be universally recognized hereafter.

When we look back at the celebrated litigation between *Gibbons* and *Ogden*.[20] it seems marvellous that Chancellor Kent should have held, and that the court of errors of New York should have unanimously affirmed his holding, that a licensed vessel of the United States had not the constitutional right to freely navigate between the states! As the reversing decision of the court at Washington in that case released the waters of New York and the Union from the grasp of monopoly, so the decision in *Rodgers' Case* has released the Lakes from the narrow technicalities of English precedent.

Mr. Justice Field has now added another to the list of great judgments which entitle him to the gratitude of his fellow citizens of the bar and the community. His opinions in this case, the *Chinese Deportation Case*, the *Chicago Lake Front Case*, the *Nebraska Case*, the *O'Neil Case*, the *Fiat Money Case*, and many others, will stand as monuments in the jurisprudence of our country as long as it endures.

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[16] III Sumner's Memoirs, p. 53, note.

[17] Compare *Fox v. Ohio*, 5 How., 410; *U. S. v. Marigold*, 9 How., 560. also *Sands v. Manistee Co.* 123 U. S., 288.

[18] 1 Doug. Mich. 154. [19] 35 Mich., 7.

[20] 4 Johns Ch. Cas., 17 Johns., and 9 Wheat.

THE COURT AND THE JURY.

FRED H. ALDRICH.

The law fixing the limit between the province of the court and jury is so well established in this country and particularly in this state that it may seem like a waste of time to dwell at any considerable length upon this branch of our judicial system. But inasmuch as these questions come before us in every jury trial I deem them of sufficient importance to justify a paper upon this subject. I do not take the enviable position of one standing as the champion of some great reform—I say enviable for the day is past when the reformer is a martyr—and to-day to advocate the preservation of anything that had an existence in the previous century for any other purpose than as a curiosity, will lay one liable to ridicule and to the charge of being a fogy. But I will simply appeal to you gentlemen as the custodians of the dearest rights of the people of this commonwealth to preserve one of the most ancient institutions of free government,

No matter how many various theories we may have as to the origin of the jury system as at present constituted, all will agree that it is an institution of great antiquity. For the purposes of this discussion it is not very important whether we can trace its geneology back to ancient Greece in the laws of Solon, whether it originated in the Roman custom of the prætors referring questions of fact to the *judices*, or whether it has come down to us from the ruder, freer, more barbarous people of the north. If it is a natural growth from the ancient custom of the northern races, as I am inclined to believe it is in the main, it is not a matter of the greatest importance whether it was a Norman institution, or whether it was derived from the Scandinavian nations or was brought by the Saxons from their native forests to the land of their adoption. There are arguments in favor of all of these various theories, but I believe that, in so far as it can be said to owe its origin to any of these peoples more than to others, our jury system is derived from the Saxons. Among the Saxon customs may be found institutions of its nature before any other power had ever exerted any influence upon those customs. For many

centuries after the glimpse of the ancient Teutons, which we get from Cæsar, we only learn of these customs after long intervals. Tacitus describes these people and many of their customs quite minutely. But the first intelligence that we gain coming from Saxon origin is of King Alfred's time. From what we can learn we may discover institutions among the Saxons as nearly like the jury of later times as those which we can find in any other country of a corresponding date. The changes which we can detect from time to time are no greater than could be explained by the changing circumstances of the people.

The Saxons, before crossing the English channel, had never been conquered by any other than Teutonic races. They came as the host moving in arms bringing with them all their movable effects and their wives and children. It was like the conquests usually were of these people, a migration and, naturally, they brought their customs with them. There is no evidence that they adopted any of the institutions of the Britons. Indeed so tenacious were they of their ancient customs that they allowed the substantial buildings of the cities to fall into decay while they clung to the simple dwellings such as they had inhabited in their forest homes. William the Conqueror came, not as a Norman prince but claiming to be the rightful ruler of England, and to govern the people according to their own laws. All the changes in the laws and customs which were inaugurated after that time were those only which were rendered necessary by the altered circumstances of the people. In the various difficulties that ensued between the king, the barons, and the people, each faction constantly appealed to the ancient customs of the realm. Each succeding prince took an oath similar to that which had been taken by the Saxon king. Instead of the various nations, isolated one from another in the matter of location, language, customs and race prejudice, copying this system from one country, is it not more probable that, in the course of the evolution they passed through a period of this usage as a natural phase in their developement? Those countries that have so perfected the system as to adapt it to a higher and more complex civilization have retained their ancient freedom, while other nations, which have passed through this phase and abandoned the system very much as they found it, have buried with it many of the liberties of their people.

Then let us look through the direct line of our national

descent to the forest home of the Saxons, for the fore-runner of this institution. There we may find a tribunal presided over by a chief officer with a body of the common people to hear the cause and advocates to speak in behalf of the parties to the cause. Eloquence was not an unknown art among those people, or if unknown as an art, it flourished as the spontaneous outburst of awakening grandeur of character in the savage breast. While classic halls and the crowded forum in the city of the seven hills echoed with the eloquence of a civilization that had reached its zenith and was sinking toward the horizon, the great dim forest of the north resounded with the thunder of a new untamed eloquence that was like the sunrise cannon proclaiming the dawn of a new more vigorous civilization.

While the fact of the antiquity of the jury system is of itself no argument in its favor, yet it affords us historic knowledge by which we may test its usefulness, and I do not think that it will be necessary to repeat all the encomiums that have been pronounced upon this system by our most learned writers, nor to add anything thereto, to convince you that it should retain a permanent place in our system. In no other country is the right to trial by jury so zealously guarded as in this nation. In no other state in this country is that right hedged about with more jealous care than in the state of Michigan. In England the trial judge may express his own opinion freely upon the weight of the evidence, and use all the power of his superior learning and high position to influence the jury toward his view of the case being tried before him. And it is well known that the verdicts in England are usually influenced by the court. Indeed this fact has been favorably commented upon by English writers, for the reason that thereby disagreements of juries are prevented.

In some of the states in this country the judge may, in summing up, give his opinion upon the weight of the evidence, and advise the jury as regards the verdict they should give. Most of the states have some statutes upon this subject, but where it is left as at common law, I suppose the rule laid down by Chitty should be regarded as in force. He says: "It is the practice for the judge at *nisi prius* not only to state to the jury all of the evidence that has been given but to comment upon its bearing and weight and to state the legal rules upon which the subject, and their application to the particular case, and to advise them as regards the verdict they should give." In this state it

is the duty of the court to charge the jury only as to the law in the case, and the jury are the real triers of the facts uninfluenced by the opinions of the court upon such facts. Certainly no stronger rule could be asked in favor of the free action of the jury than is provided in our statutes, and it might seem superfluous to say anything on this side of the question. But the modern unrest that will be satisfied with nothing that is not perfect, and is consequently satisfied with nothing human, has put our jury system upon the defensive.

Edward Bellamy has given to the laymen a little volume in which he sets forth a whole political system with the jury left out. He proposes to have persons accused of crime tried by a presiding judge, assisted by the prosecuting attorney and the counsel for the defense, and then adds very significantly that under such a system the guilty man would usually plead guilty and thus end the whole matter. He might have added that a great many innocent men would in all probability do the same thing. Thompson gives to the jurist his view upon this subject. In his introduction to his little work on charging the jury he says, after enumerating the evils of the jury system: "It thus becomes a serious problem how to preserve the benefits of the jury system and at the same time to dispense as far as possible with its evils. I am convinced that this can best be done by so changing our rules of procedure as to give to the judges more control of questions of fact at the trial and more control over verdicts after they have been rendered." I believe that the learned author is prescribing a remedy that is worse than the disease. There is a natural dividing line resulting from the very nature of the situation, and to deviate from such line on one side would lead to coufusion and uncertainty, on the other to absurdity. A judge may have superior opportunities that would give him a clearer knowledge of men, and a keener discernment that will better enable him to judge of the truth of the witnesses. As the late Mr. Green, of Hanover, once said to a trial judge who interrupted him in the course of an argument with the suggestion that the court is always presumed to know *some* law: "Sometimes this is a very violent presumption." However, there is a chance for discussion on even this point. But allowing that he has such powers that he may exert or not as his judgment or caprice may dictate, what a chance is here left open for uncertainty. One judge may believe that he should confine himself to the law. Another will think that it is his sworn duty

to see that the jury decide the case according to his view of the facts. One of the greatest advantages of the jury system is in the fact that in any controverted point individuals are liable to take an extreme view on one side or the other, while an aggregate body will likely agree, if at all, for the right, or will take a middle ground which will represent the common sense of mankind brought to bear upon the disputed question. Education and greater experience does not vary this rule. Note the career of a certain number of students: They have their different ideas upon politics, religion and the various questions that agitate the minds of men. Do they come together by greater learning? No, more likely each is confirmed in his early views. So the educated man in a matter that rests upon opinion and is not capable of mathematical demonstration is as likely to be on the wrong side as a man of good average intelligence. And placing one whose position and surroundings are such as naturally to inspire a certain degree of veneration at the head of twelve men of average intelligence, having the duty to authoritatively instruct them upon certain matters and the right to advise them as to other matters, is it improbable that some confusion should arise as to what portion was the instruction and what the advice? Is it anything more than probable that the verdict of the twelve men will often be the echo of the voice of the one? A great many safeguards have grown up around the jury system to insure freedom from bias or prejudice in the minds of the persons who shall try any issue of fact. No one can tell until the jury is called who will try the particular case. The jurors are put upon their *voir dire* and are excused on account of answers to questions that no one would ever think of putting to the court. And yet this is not enough. Certain peremptory challenges are allowed for reasons not stated, which may be just as good as those enumerated as grounds of challenge for cause.

And now, after all this precaution is taken it is proposed to place at the head of this jury to advise them as to their verdict upon the facts one whose ability learning and postion will give him a commanding influence over them, who, for aught the record will show, may consciously or unconsciously be prejudiced to any extent that may be imagined. But, you may say, a court is above all prejudice. That may be true, yet the working of the human mind is not so subject to analysis that when a conclusion is reached one can say so much of this conclusion was based upon prejudice, so much upon my former convictions, and so much upon the

evidence. I will regard only that which is based upon the evidence in this case. The fact is that every opinion that we have has been formed little by little by certain subtle influences, and it is as impossible to discover the effect of each of these influences as it is to look out into the open air and discover the various colors that are revealed by the prism. When we depart in the other direction from the natural line of division that leaves all questions of law to the court, who has had a special training in the law, and all questions of fact to the jury who stand, representing the judgment of the community, and attempt to make the jury the judges of the law as well as of the facts, we adopt a rule as absurd as it is fallacious. This rule has been established in several of the states either by statutory enactment or through the decisions of the courts. In Illinois, the judges in criminal cases usually charge the jury that they are the judges of the law as well as the facts in the case, and if they can say upon their oaths that they believe that they know the law better than the court itself they have the right to do so. In one case the questions resolved themselves mostly into matters of law. It was such a case as a Michigan judge would likely have taken from the jury, and the court supposed that he had practically disposed of the case in his charge, but to his chagrin and surprise the jury returned a verdict just the opposite from that which he expected, and he said: "Gentlemen, I supposed that you understood my charge, but I do not see how you could possibly have found such a verdict under the charge which I gave you. If you had considered what I said to you at all you certainly would never have found such a verdict. You will remember that I said to you that if you could say upon your oaths that you believed that you knew the law better than the court itself you had the right to do so. If under all the circumetances you are prepared to say that the court is wrong then the statute gives you that right." The foreman arose and said: "Your Honor, we did consider that question." In reviewing a judgment found upon such a verdict it is impossible for the court to tell whether the jury have made a mistake in the law, or take a different view of the facts from the appellate court so that it becomes necessary for the whole case to be considered by the court and thus instead of the province of the jury being enlarged it is narrowed, as its verdict may be set aside upon the bare supposition that it has made a mistake as to the law.

It may be well in courts of inferior jurisdiction where the

presiding officer is elected from among the laymen of the neighborhood, to make the jury the judges of the law and the facts. But the absurdity of such a system in courts presided over by judges who are learned in the law, is so apparent that it seems as if it could not long continue. Countries which in their early history possessed a system of trial somewhat similar to that of the Saxons, from which our jury system probably took its rise but which, when the wants of society became more complicated, and it was necessary that the laws be interpreted and expounded by those who were learned in the law, failed to allow the system to grow with the growth of their civilization, discarded it altogether. I believe that the preservation of the jury free and untrammeled so far as its province goes is necessary to the continuence of our liberties, and that the continuance of the court in exercising the functions of expounding the law is necessary to the preservation of the jury.

It may be said that in this country. where every official is chosen either directly or indirectly by the people, the jury is not important. It would be difficult to estimate just how much that very fact is due to the influence of the jury system. I will venture the opinion that this system has been the most important factor both in the development of all of our free institutions and in the education of the people to such a plane as to qualify them for citizenship in a free country. Civil liberty may be possible in any form of government with the right kind of officials, but extreme tyranny would be impossible in any government that would guarantee the jury system to its subjects. I believe that with the jury system the people of almost any country would in time work out for themselves a free constitution, and without it any government may gradually drift into absolutism. While it is true that our officials are chosen by the people, yet every society is divided into the governing and the governed. In every case there is the government compelling the people to contribute to its support, prescribing limits to their action, and punishing them for the violation of its orders. And in this country it will always be a valuable right, when one is proceeded against by the government, to have his case determined by an impartial jury of his fellow men, who shall judge of his conduct not as superiors placed above him, not by the standard of favored men drawn from a particular class, but by the standards founded upon the judgment of twelve ordinary men surrounded by the same conditions

as himself. The jury is about the only institution in our government that is not dominated to any extent whatever by party politics. It is the only institution that represents not only the party in majority, but the whole people.

I know that there are times when the right of the controversy seems so clearly with one of the parties that the judge will fear to leave the case to the jury, but if the right is so clear to *him* may we not suppose that it will be apparent to the jury, or if the twelve men take the other view may he not be mistaken? If a party chooses to have a jury trial he should have a trial by jury, and for a judge to accomplish by facial expressions and inflections and tones of voice what cannot lawfully be done in a straightforward manner is to stoop from his position and perpetrate a fraud upon the rights of one of the parties to the case. The court should be so conducted as to command the respect and confidence of the community. It is more important that the judge should remain impartial and true to duty than that the party whom he believes to be right should triumph in the particular cause. Where a jury is demanded its members should be allowed to act freely upon their own convictions upon the evidence and should receive the law from the court in plain lucid terms as free as possible from technicalitities and obscure phrases, If there is substantial proof upon all of the necessary elements in the case a verdict should not be directed even although the court is thoroughly convinced in favor of one of the parties.

If a case has been fairly presented to the jury I believe that neither a judge upon motion for new trial nor an appellate court should refuse to disturb the verdict simply because it is deemed to be inconsistent with the weight of the evidence. By this course the law will retain its certainty and will not vary to suit the exigence of every case. The court will lay down the principles of the law in a cool logical manner. There will be no jumble of law and fact, no coufusion, no uncertainty. If the jury is moved by sentiment, local prejudice, or the prevailing spirit of the times to lean towards one side or the other, the harm, if any, is done only in the particalar case. Their errors will not survive to pervert the law in after years, but they are buried like those of the physicians, when their work is done.

And yet, the very errors of the jury are often in the interests of mercy, and, sometimes, snbstantial justice. The law is stable, it is right that it should be so. One may know the law and shape

his conduct in accordance with it. It cuts clean and mercilessly and, were it not for the harmless errors of the jury, by reason of its universality might often prove an instrument of injustice. The common sense of mankind has expressed itself in courts of equity and in legal fiction to bring stable law into harmony with progressive society. It has expressed itself in the verdict of the jury in such a manner as to do for the moment what equity does for all time. It has relaxed the strict letter of the law in the interests of justice in the particular case. The jury makes no law, while the court is the oldest legislator. The first notion of law is not a legislative enactment, an imperial proclamation nor the enunciation of a principle, but it is a judgment in a particular case. The first growth of the law was in the deduction of principles from cases decided. Codes, legal treatises, and statutes, all came after the formation of the system of the law had begun, and they mark the periods of crystalization as the law is evolved into systematic form. But, while the court was the first legislator, and still exercises a certain influence in the modification of the law, yet the line that forms the limit between the duties of legislative assemblies of our day and those of the courts, should be well defined, and the aim should be kept in view never to have them clash.

As Justice Cooley has well said: "The court should not attempt to run a race of right, reason and expediency with the legislative branch of the state government." The court should confine itself so far as it is a law maker to the construction of the laws as they now exist, and the adaptation of established principles to the changing circumstances of life in the advancing civilization. The day of legal fiction as a necessity to modify the law and enable it to keep pace with progressive society is past. The legislatures respond very readily to the demand for change and that factor, together with equity, the principles of which will always form a part of every advancing system, are fully equal to the emergency of giving to our law that reasonable growth that shall make it progressive while still retaining the quality of stability.

In this paper I have not entered into an enumeration of the benefits of the jury system. This has often been done in time past in strong, even extravagant terms, but I trust I have said enough to justify the assertion that in seeking to perfect our judicial system we should neither look for the abolishment of the jury nor the limitation of its powers. There is a growing sentiment

in favor of allowing a majority verdict to be decisive in civil cases. Advocates of this change may be found both at the bar and on the bench, as well as among the people at large. Very recently the Patrons of Husbandry in this state adopted resolutions favoring such a change, which shows that the masses of the people have been thinking about the matter. I am not in favor of this change. If one's rights are to be forever adjusted by an action at law the evidence should establish a case with such a degree of certainty that a number of men of good average judgment would come to the same conclusion. I believe that if any change were made it would be better to have a lesser number of jurors, and retain the requirement for a unanimous verdict. But the number should not be materially lessened. I have no superstition as to the number, and see no magic in twelve, but the jury should be a numerous body so as to avoid the liability of its being dominated by factions, and that it may embrace men of various temperament and tendencies. The verdict should be such as would be likely to express the opinion of men generally if the facts were submitted to them. With a majority verdict a very little change in the *personnel* of the jury would turn the case one way or the other. Such a verdict would often represent what would be the opinion of a minority of the community were the questions submitted to them. A unanimous verdict would more likely express what would be the general opinion. A unanimous verdict of six jurors would be more decisive than a two-thirds verdict of twelve, for if six men all decide one way it would be fair to presume that if six more were added that at least three of them would agree with the first six which would give a three-fourths majority of twelve. However, if anything in the nature of a majority verdict should ever take the place of a unanimous verdict I would suggest the following plan: If the court should be satisfied after the jury had been out a considerable time that it would be impossible for them to return a unanimous verdict, he should direct them in case any eight or more of their number agree upon a verdict, to return such verdict, whereupon it should be entered as a verdict of two-thirds of said jurors and judgment should be rendered upon such verdict, provided that either party could move before the first day of next term to have such verdict and judgment set aside, and that it should thereupon be set aside as of course and a new trial ordered.

If at the second trial there should be an agreement of the whole jury their verdict should be decisive, if eight or more of the

jurors agree upon a verdict in favor of the same party that obtained a verdict in the first instance, such second verdict should be conclusive, provided that if it be for a larger amount than the first verdict, it should be valid only for the amount of the first verdict. In every case the jury should first be required to attempt to arrive at a unanimous verdict or the majority verdict will often be a leap in the dark. I do not propose this plan as one that I care to have adopted, but I believe it would be preferable in case a majority verdict ever obtained in this country. It would remedy the only great wrong in the present system without interfering with its advantages to a very considerable extent. This plan would reach those cases where one of the parties leads a sort of charmed existence among his fellows, so that he can always boast of being sure that at least one juror out of every twelve will be on his side no matter what may be the merits of the case.

Cadillac, Mich.

SOME QUESTIONS ARISING UNDER RECENT TAX LAWS.

A. C. MAXWELL.

The legislature of Michigan, for nearly every session for the last fifty years, has made some effort to improve the tax laws of the state. Uutil the act of 1887 was passed these efforts were not very successful. The legislature has attempted at various times to declare tax-deeds conclusive evidence of title, but it seems to me that in these various efforts to improve the law the legislature has overlooked the most important of all, and that is in some way to secure an honest assessment of property liable to be taxed, and some efficient safegurds as to the amount of money to be raised by taxation. The supreme court has decided that the circuit courts in chancery have jurisdiction over these tax proceedings. That question being put at rest, we may examine this tax law in a friendly spirit, with a view to the improvement of it by amendment.

The legislature of the state has always touched questions pertaining to the valuation of property in a dainty way, as if afraid to settle the same on some honest basis, and, before the commission act of 1882, merely provided that the assessing officer should attach a certificate to the roll as a safeguard against fraud and favoritism. That this was deplorably insufficient every one knows. The tax commission of 1882 even abolished this safeguard, and made no improvement in the manner of ascertaining the property to be taxed or of fixing an honest valuation on it. The present tax law, although a great improvement over former laws, reads very dubiously. First, it provides that the supervisor may demand a sworn statement for general purposes, as if the legislature did not wish to say for the purpose of arriving at the true sum that ought to be assessed against the tax-payer. While this seeming fear of an honest assessment exists in the tax law but little moral support can be brought to aid the authorities in the collection of taxes. Now, I suggest that this law be amended so that an oral examination under oath shall be required in all cases to aid the assessing officer in arriving at the proper

basis of valuation. This will tend towards making the assessment roll an honest document.

I further suggest as another change that when the assessment roll is completed and the boards of review have acted upon it, that such rolls be laid before a court in chancery for final correction, and that for a certain number of days any taxpayer may object before the court to his own assessment or to the amount assessed to any other taxpayer on the roll, and that the court have power to correct any improper valuation, even to the making of a new assessment roll, and to punish, as for contempt, any violation of the law with regard to it.

The next important feature in taxation is to have the tax proposed to be levied honest. By honest I mean that such taxes are necessary, and within the limits fixed by law. Therefore I propose a second amendment to the law providing that when the moneys are proposed to be raised by taxation and the various rolls of the county are acted upon by the board of supervisors and the county estimates are fixed by the board, that these estimates also be laid before the court, with a provision that any taxpayer may for a certain time object to any item of the proposed tax, and that those items objected to shall be examined into by the court, and either be modified or improved.

By these amendments the law would be greatly improved; we would have an honest valuation and an honest tax, and the whole moral force of the state would support the taxes and tax titles accruing under the law. The tax law of 1893 is to some extent experimental. There are some very crude and singular provisions in it. By section 70 of the law which provides for the sale of lands for delinquent taxes, it is provided that the county treasurer shall file a report of the tax sales had by him in the circuit court in chancery. Then follows this provision: "All sales shall stand confirmed, subject to the right of redemption provided for in section 74, unless objections thereto are filed within eight days after the time limited for filing such report, without the entry of an order or further notice. The practice with reference to the setting aside such sale shall be the same, as far as applicable, as a sale in equity on the foreclosure of mortgages: Provided, no sale shall be set aside for inadequacy of price, except upon payment of amount bid upon such sale with interest and costs. And provided further, that no sale shall be set aside after confirmation, except in cases where the taxes were paid, or the property was

exempt from taxation." Now, here is an order of confirmation of sale without any written order. The court of chancery is a court of record. All the proceedings must exist in writing. An order confirming a sale is a judicial order, depending on the discretion of the court. This discretion must be exercised on the question of the value of the property, the amount it was sold for, and the condition of the party owning the same. These are judicial questions to be passed upon by the court after being informed by report or other showing of the facts. Can the legislature in advance, before such report is made, or its contents can be possibly known, order such a sale confirmed? This is a very serious question, and seems to admit of but one answer, that the legislature has attempted a usurpation of the duties of the court.

It is further provided that no sale shall be set aside after confirmation except in cases where the taxes were paid, or the property was exempt from taxation. The power to set aside a sale in chancery has always been freely exercised. In contemplation of law the court makes the sale. It is a judicial function of the highest nature to determine whether or not a sale ought to be confirmed or set aside. It seems as if the legislature had attempted to invade the province of the court by this attempted restriction. And it seems to me that where it is shown that a thousand dollars' worth of land has been sold for five dollars, that the court ought to set the sale aside. In such a case it might exact payment of all the taxes, interest and costs, and a liberal bonus for the purchaser because of his bargain. And the tax law thus administered would be more effectual than if administered otherwise. There would be nothing like a grab or snap about these tax titles. The purchaser would be sure of his money and a liberal bonus, and also be sure of his title to the land unless his deed was set aside in chancery, and this bonus paid to him. It would induce men having money to invest to buy the tax titles as an honest investment, and it would spur up the delinquent taxpayer to pay more promptly for the reason that if he does not he must pay smart money in addition to the other sums for his tardiness.

NOTES.

THE MICHIGAN REPORTS.—Nearly one hundred volumes of the regular series of Michigan reports have been published—volume ninety-eight being now in print. The Hon. W. D. Fuller, the present reporter, has compiled more volumes than any other single reporter. Vol. 59, published in November, 1887, was the beginning of his series. Vol. 98 will therefore be his fortieth volume. The number of cases reported in the forty volumes is 4,120, and they occupy 26,110 pages of text—about six and one-third pages to a case. The reporter is only about forty days behind the court, which is not a bad record by any means.

COMMITTEE ON LEGISLATION.—In the report of the proceedings of the first convention of the association of judges, heretofore published,[1] the names of the committee on legislation were omitted. The following judges compose the committee: James B. McMahon, Ludington, Victor H. Lane, Hillsdale, and George M. Buck, Kalamazoo. The first section of the constitution, published with the proceedings, should be corrected to read: "This association, composed of the judges of the supreme and circuit courts and municipal courts *of record* of Michigan, shall be known as the "Association of Judges of Michigan." Two more of the excellent papers read at the convention are published in full in this issue.

MYRA BRADWELL.—In the death of this well known woman at her home in Chicago, February 14, one of our most highly prized contemporaries loses its talented editor, and the women of America a fearless but sagacious champion. She was the first woman to apply for admission to the bar in the state of Illinois, and in 1869 passed a most creditable examination, but was denied admission upon the sole ground that she was a woman. Her right to admission was denied by the Illinois supreme court. She sued out a writ of error in the United States supreme court against the state of Illinois, which was argued in 1871. In May, 1873, the supreme court of the United States affirmed the decision of the Illinois supreme court, Chief Justice Chase dissenting from the majority opinion. The legislature of the state of Illinois subsequently passed an act permitting women to gain admission, but she was then engaged in her editorial duties and did not again seek admission. The *Chicago Legal News*, the first weekly legal pub-

[1] 3 Mich. Law J., 18

lication in the West, was established in 1868, and she has been its editor continuously. Since that time she has held numerous and important positions upon various committees and boards. Many matters in which she has been a leading spirit have been of national importance. Much legislation in favor of women is to be credited to her untiring efforts. Notwithstanding the earnestness and zeal with which she entered into her public duties she was none the less domestic in her tastes. None of those objectionable traits which prejudice one against some women occupying a similar public position were ever noticed in her. Possessed of a nature essentially and thoroughly tender, sympathetic and womanly in every way, none knew her but to admire and respect.

LAW BOOK NEWS.—The latest venture into the field of legal journalism is *Law Book News*, "a monthly review of current law literature and jounal of legal bibliography." It is published monthly by the West Publishing Co., and is almost exactly the size of the MICHIGAN LAW JOURNAL. Its purpose, as stated in the salutatory is "to increase the usefuluess of all other current law publicatiens by making them available and accessible." It further states: "Its primary function will be to furnish a thorough and practical index to all that is of practical value in legal periodicals and new law books, and to whatever is of special interest to the legal profession in the miscellaneous literary reviews and periodicals." If it keeps up to the standard set by the first number, now before us, it will be all that is claimed for it. It is to legal literature what *Review of Reviews*, *Public Opinion*, etc., are to the general current literature. It occupies a novel field, which no other publication makes any pretension to cover thoroughly. Judging from the first issue, and considering the reputation of the publishers, we are safe in predicting a most successful career for our new contemporary.

THE LATE JUDGE JOHN A. EDGET.—In the death of the Hon. John A. Edget, of Saginaw, the state of Michigan loses one its ablest and most highly respected circuit judges. The Saginaw bar comprises an able body of men, as is evidenced by their vigorous organization—the Saginaw county bar association. None was more active in that association; nor held in higher esteem by its members, and his fellow associates, than Judge Edget. They turned out *en masse* at the meeting held to pay tribute to his memory. Feeling speeches were made by prominent members. His obituary could not be given in fewer or better words than in the following paragraph from the report of the committee on resolutions, of which the Hon. Wm. L. Webber was chairman:

"Hon. John A. Edget departed this life on the 10th day of February, 1894, at the early age of 44 years, after a lingering illness. He was a native of Michigan and of the county of Saginaw, and resided his entire life within the borders of this county.

He was educated in the public schools of the city and was a graduate of the law department of the University of Michigan. He was a thoughtful, earnest, studious man, faithful to every trust reposed in him. His career as a lawyer was marked by a steady progress in his profession to the time when he was called to serve as judge of the tenth judicial circuit. He had then attained to the reputation of a learned, skillful lawyer and advocate. His reputation had extended to the entire state and beyond its borders. As a judge of the circuit court he was honest, fearless, painstaking and incorruptible. He brought to the bench that same high standard of duty which ever controlled him while at the bar. While a profound student of the learning of the profession he was also possessed of a knowledge of business methods and financial affairs which led to his employment in positions of trust for the handling of large properties, and his business was always so conducted that no complaint on the part of those interested could exist. An honest man, an earnest and eloquent, learned and upright judge. Let us emulate his virtues and revere his memory. By his untimely death the bar loses one of its brightest and best members, and each has sustained a personal loss."

HENRY WOLLMAN, '78, ON "FRIENDLY RECEIVERSHIPS."—In the *North American Review*, Henry Wollman, of the class of '78, law department, University of Michigan, now one of the ablest attorneys of Kansas City, as well as one of the most patriotic and loyal of Michigan's alumni in the Southwest, makes a fearless attack upon corporate abuses—with special reference to the present day creation of "friendly receivers." The cause of individual interests, as opposed to the interests of corporations, is so seldom espoused nowadays by men of real ability, that the spectacle of a man of courage and brains, like Mr. Wollman, out championing the interests of the people and denouncing the abuses of corporate power, is really refreshing. The political demagogue, by his overheated ranting and senseless vaporings about corporations, painting them as hideous monsters and attributing to them all sorts of industrial evils, has worked infinite harm to those who are striving to evolve a correct solution of the "corporation problem." It requires considerable courage, therefore, for a man of recognized ability and standing to undertake to expose the "off-color" methods of capitalists and to suggest antidotes for the poisonous influences of concentrated wealth.

Mr. Wollman does not mince words in his article on "friendly receiverships." He says: "The judiciary of this country seems to be under the hypnotic charm of the officers of corporations. The facility with which corporation managers, when their individual interests require it, are permitted to precipitate their corporation into a receivership, and have themselves or some "man" whom they can control appointed, leads one to conclude that some judges must believe that the object of the laws creating corpora-

tions is to provide "soft places" for certain gentlemen, as officers, while the corporation lives, and as receivers, after its death.

"There is a great outcry among the masses against corporations. Some people, of radically socialistic tendencies, even desire the abolition of all corporate franchises. This, of course, is absurd. However, the abuses which have grown up are such as to imperil the existence of the laws under which corporations are created. When men, who have been swindled in their dealings with corporations, see the very men who have despoiled them appointed receivers, they, almost involuntarily, begin an indiscriminate crusade against corporations; those that are honestly as well as those that are dishonestly managed, coming within the sweep of their condemnation. The most vicious abuse that has grown up with reference to corporations is "frienly receiverships." The law requires most substantial and urgent grounds for the appointment of a receiver. There is, however, a fascination about the exercise of power; and, on this theory only, can one understand on what meager and flimsy grounds receivers are appointed. Business failures more often result from poor management than accident, and, in the case of corporations, more frequently from reckless than weak management. Many corporations are wrecked by officers using the corporate funds as if they belonged to them. These wreckers, however, have little difficulty in getting a clean bill of health from the courts in their appointment as receivers. If a corporation manager is so unskilled or reckless that he is unable to keep it going, how can it be that he possesses sufficient ability or stability to operate it successfully as a receiver? Has an order of court the magic power to transform him into a man of business talent and genius? But, you might say, he acts under orders of court. Every one familiar with these matters knows that almost invariably the orders made are such as the receiver, who is supposed to possess the confidence of the court, applies for.

"The larger number of receiverships are simply placing the strong arm of the courts between the officers and the stockholders and creditors. If the officers knew in advance that when their companies failed they would lose control, they would be much more conservative. Courts in appointing receivers should "represent" those who are not present in court, and should appoint men who will guard the rights of all alike. Our corporation laws generally require radical overhauling. Corporations should be examined at frequent intervals by competent officers, and when the capital is impaired a reduction should be advised, unless the impairment is promptly made good. The law should most rigidly prescribe the duties and define the liabilities of directors. Directors who are there simply for "show" should be weeded out. When the officers of a corporation acknowledge their inability to successfully manage its affairs, by asking for a receiver, they should step down, and give way to some impartial, capable man who has no past to cover up and no selfish schemes to foster."

LAW SCHOOL NOTES.

E. F. JOHNSON, EDITOR.

H. C. WALTERS, ASSISTANT.

U. F. Bickley, law '93, a former president of the Webster Society, is meeting with success in the practice of his profession at Hamilton, Ohio.

Dean Knowlton began his series of interesting lectures on "Jewish Institutions in the Time of Christ," on Monday morning, Feb. 2. This course is attracting large audiences.

During the recent trip of Profs. Knowlton and Mechem, visiting the various Eastern law schools, they say that in their opinion they found none where the students were doing as much work as here.

Washington's "birthday" was observed by the department in the usual patriotic and hearty manner in University hall. The speaker of the day was Congressman J. P. Dolliver, lawyer, of Iowa. His subject was "Public Duties in Relation to Politics."

N. A. Phillips, president of the law class of '91, is in Washington, D. C., as secretary to his father, the Hon. Thomas W. Phillips, a prominent member of congress from Pennsylvania. Since leaving the University of Michigan he has completed a thorough course of study at the University of Paris.

G. A. Katzenberger, law '90, has an office in 48 Reaper Block, Chicago, and has been appointed assistant attorney of the Bureau of Justice. He was a prominent member of the Phi Delta Phi fraternity while here, and at the last national convention was elected secretary and treasurer of the council. He was also secretary of the committee of the Congress Auxilliary having in charge a Fraternities Congress.

The "Practice Court" is proving a great success. The Judge, Prof. Mechem, has a peculiar faculty for expeditious and yet thorough work. A great deal of work is disposed of every day. The court sits every day at 2 o'clock. The students are feeling that nothing during their entire two years course will be of more value to them than this practice. They are obliged to do all the work connected with a suit from the commencement to judgment.

A rather novel case has been carried to a successful determination by J. C. Petherbridge, law '91, now police judge at Leavenworth, Kan. A private in Troop F, eighth cavalry, was sentenced by a general court-martial at Fort Yates, N. D., to the military prison for a period of two

years. Mr. Petherbridge prepared and presented a petition to President Cleveland for his pardon, supporting it with a thorough and elaborate brief, in which the legality of the trial court was vigorously attacked. His views were concurred in, and a few days ago his client received the coveted discharge.

Never in the history of the law department has there been so much general good work done by the individual students as is being done now. Dean Knowlton is entitled to much credit for having so arranged the work as to keep the entire body of students employed at all times. It must be very gratifying to him and the entire faculty to be able to step into our spacious reading room and library and find it crowded from 8 A.M. until 9 P. M. Within the past two years the library and reading room was nearly doubled in size, and yet, with the increased work and the desire of the students to make original investigation, it has proven too small. Librarian Vance says, that many times recently students could not be accommodated either with reports or text books, or even with room.

The editors of *To-Wit:*, the senior class annual, are making rapid progress. The publication gives promise of being the most substantial one of its kind ever issued on the campus. The statement is made by those who should know that it is the first class annual that President Angell or Judge Cooley have ever favored with articles. The President will write a biography of Judge Cooley while the Judge will write a history of the department. Dean Knowlton has also in course of preparation an article, as have likewise Professors Thompson, Mechem and Johnson. The book will be illustrated as follows: Steel engraving, Judge Cooley, frontispiece; full page half tone cuts of the resident members of the faculty, and probably small half tone cuts of the non-resident members; cut of law building; cut of practice court, etc., etc. The book will sell for fifty cents. Several hundred copies have already been ordered

MONTHLY DIGEST OF MICHIGAN DECISIONS.

H. P. H.

BILLS AND NOTES—Indorsement—*Bona fide* holders.—The indorsee of a *bona fide* holder of negotiable paper, takes the same title and succeeds to the same right as the indorser, though such indorsee had knowledge which, if possessed by the indorser, would have defeated his right to recover. The *bona fide* holding, when once allowed, continues in the hands of subsequent holders. Anderson, et al., v. Northern Nat. Bank, et. al. Grant, J.

PRACTICE—Request to charge—Error.—If a party bases his defense upon one ground, and allows questions to pass unchallenged which if challenged might materially aid his defense, he cannot afterwards assign error upon this ground because the court refused to give a general request directing a verdict in his faver. Shattuck v. Hart. McGrath, C. J. (Grant, dissenting.)

ESTATES IN ENTIRETY—Tenants in common—Statute of limitations—Adverse possession.—A husband and wife owning property in common are tenants in common, and the wife's estate having been cast upon the husband by operation of law at her death, his continuance in possession is not as tenant at sufferance, but as intruder against the remainderman. The statute of limitations would clearly run, and if he continues in possession any length of time, would acquire a tortious freehold. Patterson v Dryer. Montgomery, J.

CONTRACTS—Presumption of validity—Evidence—Burden of proof.—Weight must always be given to executions, and the presumption which rests in favor of written instruments, not unconscionable in their character, but mutually advantageous in their provisions, executed by parties competent to contract, but between whom no fiduciary relations exist, in the presence of witnesses who affix their signatures as such, cannot be overcome except upon testimony from which an inference of duress, deception, misrepresentation, substitution or artifice is clearly deducible. Sullivan v. Ross Estate. McGrath, C. J.

BILLS AND NOTES—Misrepresentation—Estoppel.—Estoppel cannot be set up by a plaintiff in suing upon a promissory note which defendant avers he did not execute, unless plaintiff is misled to his injury, by reason of his belief in and reliance upon the representation alleged. Dean v. Crall. Hooker, J.

FIRE INSURANCE—Conditions in policy—Effect of knowledge by agent of inability of insured to perform.—A clause in a contract of fire insurance, providing that a "clear space" of 150 feet shall be kept around the property insured, and the agent of the insurance company having knowledge of the inability of the insured to perform that condition, the insurance company cannot set up non-performance of that condition as a bar to recovery for loss. Mich. Shingle Co. v Penn. Fire Ins. Co. Long, J.

BOOK REVIEWS.

SUMMARY OF LEGISLATION.—New York State Literary Bulletin, Legislation No. 4. January, 1894. A comparative summary and Index of Legislation by States in 1893. Albany: Published by the University of the State of New York. Pamphlet, 154 pp. Price 20 cents.

JONES ON LIENS. A Treatise on the Law of Liens, Common Law, Statutory, Equitable, and Maritime. By LEONARD A. JONES. Boston and New York: Houghton, Mifflin & Company. (The Riverside Press, Cambridge), 1894. Second edition. Two vols., 8vo. 1878 pp. $12.00 net.

This work, in its present completeness, is the earnestly directed work of nearly a score of years by one of America's best scholars and most distinguished law writers. Nearly six years ago the first edition, then, as now, in two convenient volumes, was published. More than ten years before that time the author began the preparation of a series of works upon property securities. The first to be published was his treatise on the law of mortgages of real property. There were seven volumes in the "series," as the author himself terms them, and this work upon liens is the fitting *finale*. The plan which he was carrying out he explained in his preface to one of the series.[1] He said: "I have regarded these volumes upon different phases of the subject of mortgages as constituting in fact one work covering the whole subject; and I have, therefore, referred from one treatise to another as freely as I would to other sections of the same treatise. It is my purpose to follow this method still further, in the preparation of two other treatises—one upon pledges, including collateral securities, and one upon liens—which, with those I have already published, will form a complete series of works on property securities." Referring to this statement in the preface to the first edition of this work, he added: "The task which I then set for myself I now complete in publishing the present work upon liens." All these different works were therefore being prepared, or at least planned for, at the same time. It is clear, then, that for considerably more than sixteen years this book has consumed considerable of Mr. Jones' time, and has only been completed after many long years of careful study and investigation of the subject.

The uniform excellence of all of Mr. Jones' works is too well known to need dwelling upon here. As to the mechanical construction nothing need be said. The publishers have carried on the business so successfully for so many years that the imprint, "The Riverside Press," has come to be regarded as a guaranty of superiority. The general plan of arrangement of the first edition is carried out in the second. As this is so well known to the profession it would seem sufficient to refer here simply to the changes and additions which have been made by this edition. No material increase in the size of the volumes can be noted. The way for the new matter added has been made by condensing and by changes in the typographical arrangement. In a few instances paragraphs, which

[1] Jones on Chattel Mortgages, 1st edition.

were not thought to be essential to the completeness of the work, have been omitted, to make room for what has been deemed more worthy of the space. The most noticeable change has been made in the second volume. The whole of that volume, with the exception of the last chapter, which treats upon maritime liens, is devoted to a discussion upon the law of liens upon real property. Eleven out of the eighteen chapters upon that branch of the subject are devoted to mechanic's liens. It is to this part of the work that the most important new matter has been added—nearly a hundred pages. The author says that the number of citations added is more than twelve hundred. We have not counted them, but we do not doubt the truth of the claim in the least.

The importance of the subjects treated in this work is universally recognized and admitted. That no author is better equipped, with the experience and ability to treat the subject, is also admitted. It will therefore not be considered a burst of fulsome praise to say that the work is one of the essentials to a complete law library.

DILLON ON THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA. Being a series of lectures delivered before Yale University by JOHN F. DILLON, L. L. D., Storrs Professor, Yale University, 1891; Author of Commentaries on the Laws of Municipal Corporations. Boston: Little, Brown & Co., 1894. 1 vol., cloth. 390 pp. $4.00 net.

This book is a very readable collection of lectures, and although hardly of any practical business value to a lawyer, it will undoubtedly find a ready sale among those lawyers who are ambitious to thoroughly ground themselves in the history and development of our jurisprudence. The book will not find a large sale, probably, because there are not many thorough lawyers in the country. Most alleged attorneys, it seems, content themselves with a smattering of the common law and a familiarity with the index to their state statutes, and instead of spending their time "between clients" in profitable reading of standard text books, or of some treatise like this of Judge Dillon's, they count their legal education completed and spend their time at the corner grocery "chatting with a friend," or at the base-ball game, or anywhere but in their offices. There is too little loftiness of purpose in the latterday practice of the law, and if the spirit of veneration and respect for the traditions of the law which Judge Dillon endeavors to breathe into his pupils, through the medium of his lectures, can be imparted in the least degree to the profession at large by means of the publication of this collection of his lectures, the book will have performed its mission well and have done more to advance the science of jurisprudence than a score of strictly technical treatises.

These lectures are, in Judge Dillon's own words, "just what they are, and just what they purport to be, and nothing more, namely, discourses to a class of law students, given largely to inspire a patriotic and just regard for the laws and institutions of our country, to incite enthusiasm in the study of the law rather than to impart technical instruction, to awaken inquiry rather than to satisfy it upon subjects of vital moment to the profession lying somewhat outside of the ordinary legal curriculum."

The collection is a series of twelve lectures upon our law in its old home, England, and in its new home, the United States. Probably its most admirable features are the entertaining discussions upon questions of popular interest among the profession, viz: legal education, trial by jury, the origin, development and characteristics of the common law, written constitutions, legislation, case-law, the law reports, the doctrine of judicial

precedent, codification and law reform. The book is a unique one in legal literature.

JONES ON CHATTEL MORTGAGES. A Treatise on the Law of Mortgages on Personal Property, by LEONARD A. JONES. Boston: Houghton, Mifflin & Co. Fourth edition. 1 vol. 8vo., 900 pp. $6.00 net.

Mr. Jones is known throughout the country as an authority upon the general subject of property securities. He has written other works upon mortgages, pledges, and liens, which have received the unqualified endorsement of the profession. All of his books have passed through more than one edition and have consequently been thoroughly revised so as to keep pace with the improved methods of arrangement of legal text-books. In this edition of his treatise on chattel mortgages, more than eight hundred new cases are incorporated and also all of the changes in the statutes since the previous edition was published. References are also made to cases cited in the various reporters, a shrewd recognition of the present day demand for the latest law. The statements of the law in the text are also condensed and improved in this edition. The mechanical execution of the book is faultless.

Although there are many rules which will apply to real estate mortgages alike, yet Mr. Jones has avoided citing the cases illustrating these rules, as far as real estate mortgages are concerned, and has adopted the plan of referring to his former works. This course avoids much confusion which a frequent reference to the law of real estate mortgages, in a work devoted to the law of chattel mortgages. would occasion. Instead, therefore, of using space in the discussion of well settled principles, he examines more at length than would otherwise have been practicable, mooted and doubtful questions in the law of chattel mortgages. In this respect it is a valuable treatise for the practitioner.

A new edition of Mr. Jones' work on chattel mortgages just at this period seems to be especially timely. A glance at the various reporters and a knowledge of the business of the inferior courts in the large cities of the country will show a more than ordinary amount of chattel mortgage litigation. The stringent times has led to an epidemic of chattel mortgages. The breed of "chattel mortgage sharks" has increased with marvelous fecundity. This resultant of hard times has fairly spawned upon our civilization, and nothing but prosperity will remove it. Charitably inclined people have become righteously indignant at the cunning practices of the "chattel mortgage sharks" who have taken advantage of the enforced poverty of honest workingmen, and the result has been a springing up all over the country of litigation calling in question the validity of chattel mortages. So it is that Mr. Jones' treatise, revised and modernized, is an extremely useful work just at present.

Some of the especially valuable chapters of Mr. Jones' treatise are: "Delivery and possession of mortgaged chattels; statutory provisions relating to recording, filing and refiling; removal. concealment, and sale of mortgaged property; and statutory provisions relating to foreclosure and redemption."

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*THE ROTATION OF JUDGES.**

SHERMAN B. DABOLL.

My subject and the treatment of it will I think at once place me in the ranks of, and convict me of being a reformer, according to the popular understanding of the term, which is I think that of a person, who at a time when there is no possible hope of its being adopted, advocates a measure good in itself and beneficial to the people, but about which the people have apparently no concern, and cannot be made to take any interest, and leave the person so advocating it to go on, only hoping that he may in time interest a few, and that from this an understanding of the measure may gradually spread, and the whole people, in time come to see its benefits and adopt the measure. I do not think this is precisely the definition given of a reformer by Webster but is very nearly the popular idea, and very nearly correct.

However, no matter how this may be, and recognizing that under existing conditions the change I speak for is absolutely hopeless, I still favor and advocate the "rotation of judges,"

My plan is this: I would have the state divided into circuits, so arranged that there should be not less than three judges in each circuit, and would wherever practicable have four. If necessary and the geographical situation would permit there might be five, but four should be the preferred number, grouping the territory together in such a way as would best accommodate all interests, both as to work and ease of communication, then providing that the judges residing in that territory have jurisdiction in all the territory, and follow each other over the circuit, holding

* A paper read before the last convention of the Association of Judges of Michigan. The other interesting papers read at that convention have all been published in previous numbers of this volume.

court in all the counties in turn; this rule subject to change in cases of sickness or necessity, but to be rigidly upheld save in those special cases, or, if from any cause the term of one county held too long, to allow a judge holding that term to meet his next appointment. And retaining the present provisions allowing a judge to hold for another, even out of the circuit, and allowing in case of a vacancy the governor to designate the judge to hold the term. Terms of course to be arranged by consultation of all the judges of the circuit to accommodate all parties.

At Detroit there are already five judges in the circuit. This arrangement need not disturb them for, there being already that number, the reasons for the change are not present to any extent that calls for a change. Saginaw and Grand Rapids have already two judges each, but I would include them in the arrangement, connecting them with the adjoining circuits, and think it would be for the benefit of all concerned.

I do not at this time design to go into a full or exhaustive discussion of this subject, only intending to get the matter before the gentlemen of the convention, and to arouse among them sufficient interest to have the subject discussed during the time intervening between this and our next meeting, with a view to ascertaining the sentiment of the various members of the convention, and giving them a chance to get the views of the people at home.

I think that some of the benefits of this plan would be:

First: An equalization of the work of the judges of the state in all the circuits affected by the movement; and this could by this method be made as nearly complete as it is possible to make it. This would be reason enough for it if there were no others. I need not say to a convention composed as this is that some of the judges are now overworked, that they have more than they ought to do and more than they can do, and have any time for rest and recuperation. I know a judge who at three years after he took the office had not had two weeks that he was not on the bench. I at one time held court for thirty-two consecutive weeks, with no rest but Sundays and holidays. Now this is not more than these men could do, for they did it and some way got through it, but it was more than they onght to do and I think more than they can do and give the best abilities they have to the work.

Adjoining these circuits may be a place where the judge could spare a month or even two weeks to assist these men which

would in some sense relieve them and make a great difference with the drudgery of one and not be a burden to the other. I am not aware of any judge who is now finding fault, or has so little work that the time hangs heavy on his hands, but this plan would come as near as possible to making every one's work equal, a thing that we should not object to. The circuit where we now are furnishes a good illustration of the argument. Ingham and Livingston counties furnish a large amount of business. The capital of the state is here, and state business is brought here and takes time to dispose of. We may safely say that the judge of this circuit has more work than he ought to be compelled to do. More I venture to say than he can dispose of promptly and have the time he absolutely needs for a little rest. Adjoining this are six circuits, and I venture the assertion that there are some of them or at least one where the judge could spare a month to help Judge Person, thus helping to even up the work and perhaps not overwork the helper. It will not answer this to say that the judge can help as matters are now arranged. While this is true in the abstract it is not practicable. And there are objections to it that we all well know, and they will unless there are changes in another direction always make it impracticable.

Again: "A Prophet is not without honor save in his own country." This in a sense is true and we all feel it more or less as we hold court from day to day, with the same attorneys, almost the same juries and the same surroundings. We have most of us grown up with the men who try cases before us, and they are our personal friends. The same is true in at least one of our counties with the litigants and witnesses. In the home county we are "Sherm" or "Charlie" as the case may be, in the other we are "Judge." Not that I think this part of it is in any sense unpleasant to us, it certainly is the opposite to me, but I think that as a rule business is dispatched a little more promptly when another judge comes to our place to hold court or we go to another circuit for the same purpose. I know of at least one judge besides myself who feels this, and as I shall not call names, you need not all disclaim or say you are not he.

Again: The athlete when training aims to develope every part of the body and to make flexible every muscle. In training men mentally the same rule to some extent applies. Take a country circuit, like my own for instance, with no commercial transaction of large size, no large corporations, only one insurance com-

pany and that a mutual, we have but little diversity of litigation, only one negligence case in six years and that arose out of the company. We try the same old questions over and over again, and we get very little change. This may not be an unmixed evil, and should lead to familiarity with the class of cases tried, but it does little to develope the judge. I concede that that is not the principal and perhaps not an important element in the arrangement of circuits, but you must remember that if the members of the present supreme court should refuse a renomination, die, or resign to run for governor, the people will surely not overlook the very excellent material for their successors that is being educated in the various circuits upon the bench, and the better equipped that material is for the work, the better for the state. I know of no better way this can be done and no better way to perfect the judge on the bench for the performance of his duties, than by giving him a wide experience, with all kind of lawsuits, and all kind of lawyers.

We are, at this time, face to face with another reason; new judges have now been elected for many of the circuits. Beginning with the year, half of the court time in their circuits for the next year, and much of the time thereafter for at least another year, other judges must hold court for them, to dispose of cases where they were interested before they went onto the bench. This will be done cheerfully, and without compensation, but it will involve a large expense on the new judge, and will quite materially reduce the net proceeds of a rather meagre salary. The plan above outlined would obviate this and do away with a very burdensome matter, and at the same time avoid some delays always incident to obtaining another judge. On the other side, there are no doubt some objections, as there will be very many things also that will occur to all of you in favor of the plan that I have not mentioned.

I will mention one objection. And at the risk of having you say "Chestnut," I will recall the story of the Irish lawyer who rising to address the court in opposition to the motion made by his opponent said: "Your honor, I have an objection to the gentleman's motion that is absolutely fatal to it, and if after hearing it your honor holds that it is not good, I have thirteen others equally fatal." So I have one objection to this plan as matters now stand, and if after hearing it you decide that it is not fatal, I will leave you to find the other thirteen. I allude to the present

salary. It will not permit the added expense, that a greater time from home, and greater length of railroad trips would demand under this system. This at present settles all chance of this plan, and with families to support and in many cases children to educate we cannot bear the additional expense. Other reasons may be advanced, but after ten years' practice under the system here advocated, and fifteen under our own, I am very decidedly in favor of the plan here advocated. I do not think that this is the time nor the place to discuss the subject of a raise of salaries. I do belive that the people of the state will raise them if there is a fair effort made, but that matter is not my subject at this time.

Gentlemen of the convention, think of this matter and if it finds favor in your sight, take measures to put it in operation and to provide for the possibility of its running when started.

ABOLISHMENT OF TRIAL BY JURY IN CIVIL CASES.

W. C. H. KEOUGH.

Unfailing signs clearly indicate that trial by jury in civil cases is slowly but surely nearing the goal of radical reformation, if not absolute abolition. There is a wide and growing distrust of the present jury system, especially in civil cases. Loud and many are the clamorings for the abolishment of that institution falsely termed the "Palladium of Liberty." The jury system has acquired a high claim to our gratitude, but is now rapidly becoming degenerate and worthless. We render just tribute in loving it for the benefits we have derived from it, but that does not blind us to its faults. I maintain that the evil resulting from this system fairly outweighs the good, and that the period of reformation is at hand. Against the *ideal* jury system I cannot possess the slightest prejudice, but between the ideal and the reality there lies an infinitude of imperfections.

In the first instance, the abolishment of trial by jury in civil cases is necessitated on the grounds of expediency. Secondly, the present system is superfluous, and to abolish it would remove so much dead weight from our code of civil procedure. The judicial system after this reform would be cheaper, more effectual, and the results would be more just and certain. In addition our courts would be better conducted, transact business more speedily, and all parties in the litigation would be better satisfied. Both systems are now in vogue, and an examination of the two-side by side, will demonstrate the correctness of the foregoing assertions.

Dissimilarity of facts in civil and criminal cases.—Writers have claimed that questions of fact in civil and criminal cases are the same, and that the abolishment of trial by jury in civil procedure, would lead to a like step in criminal procedure. This is a fallacy, and the following comparison will show a wide and glaring contradiction between the two as far as regards questions of fact. Civil suits are formed upon the social organism, and involve a knowledge of artificial rules and laws. Crime is a violation of the laws of nature. All men have the natural instincts

and sympathies of humanity, which are so essential in criminal cases, but very few men have that *artificial* knowledge which is requisite to a proper consideration and determination of civil suits. The only real likeness between the two is that both are transgressions of the law.

Competency of judges to decide facts.—A mistaken idea lodges in the minds of many, that jurors are competent to decide the facts in a case, while judges are incompetent. My experience constrains me to believe the reverse to be true. To illustrate; all judgments are formed by comparison, and the wider and more extensive a man's experience is, the more competent he becomes to render judgment. Men accustomed to one mode of training are peculiarly unfitted to judge facts with which they are unfamiliar. In purchasing a horse one would prefer the advice of an experienced jockey to that of an hundred inexperienced men; and so with all private and domestic affairs. It requires strength of intellect, continuity of thought, and much experience to follow and properly judge the facts in a long, intricate and tedious trial. One needs but to associate with the ordinary juror to be convinced of his utter incompetency in such cases. Furthermore, counsel often aim to obscure the real issues of fact by raising false issues of law. Another reason why judges are pre-eminently fitted to weigh and compare facts is that most judges were lawyers of considerable experience prior to their elevation to the bench. Their minds are disciplined to the work. Their knowledge of the law enables them to see what facts are to be proved, and who should prove them. Practice in the law has fitted them to read witnesses and detect misstatements and contradictions. Quibbling over points of law will not mislead them in regard to the facts. They make notes of the evidence, and are held responsible for all errors in judgment even. All kinds and manner of cases come before the courts for adjudication, and it is almost impossible to find a jury competent to decide the many and diverse classes of facts at issue.

I can conceive of nothing more decisive against the competency of juries to decide facts in civil cases, than the remarks of Hon. Charles S. May, who, by the way, is one of the most arduous defenders of the present jury system. He says: "It is these long, wearisome, verbose trials, burdened with remote and collateral issues, and hair-splitting discussions of legal techni-

calities, and finally closed by long and confusing charges from the court, that produce almost inevitable disagreement of juries. The native common sense droop and die in such an atmosphere. From such a trial the average juror comes forth in a bewildered and half demented condition, almost ready to be sent to a mad house. It is useless to expect just and intelligent verdicts under such circumstances." These are the conditions which really exist, and I am discussing this question from the standpoint of reality. Mr. May speaks of the judges: "Applying the rules and principles of the law to the thousand varying cases of fact, which arise in the clashing of men's interests, rights and possessions in the march and whirl of the world's affairs." Now, how can a judge apply the rules and principles of law to the facts, and still be incompetent to decide the facts?

A great point is supposed to be scored by proclaiming the jury system "An educator." If the average juror comes forth "in a bewildered and half demented condition," as Mr. May maintains, has his knowledge been augmented? Does he have a lofty opinion of the majesty of the law? The patriotic defenders of the jury system grow eloquent over the fact that by means of it the people participate in the administration of the laws. This is an old English argument. In England the judges are appointed by the Crown. In the United States all except federal judges are elected by the people, and they are even elected by the representatives of the people. Now, why are judges less of the people than jurors?

Trial by jury is claimed to be a check upon the power of corporations. The untenable ground of this argument is easily discernible. All suits against corporations must be of a civil nature. That juries are generally prejudided against corporations and will find in opposition to them I will concede. But if a jury assesses excessive or exorbitant damages the court has the power to reduce them or set the verdict aside. Moreover, the court may instruct the jury upon the evidence adduced to find in favor of the corporation, and if they find to the contrary a new trial may be granted, or an appeal taken to a higher court, where a jury is not used. Hence, I am at a loss to understand how a jury can check or defeat the rights or powers of a corporate institution.

The jury system the "Bulwark of Liberty."—It is marvelous to what a height of folly blind prejudice will carry one. In defiance of all the evidence to the contrary, it is claimed that the jury

system is the "Bulwark of Liberty." This is unsound reasoning, especially in civil cases. Trial by jury has existed in America almost since the landing of the pilgrims. During the civil war the jury system, and the "habeas corpus" act were uprooted and hurled from our midst, and martial law reigned supreme. After the civil war had ceased, and "The bow of peace had spanned the bloody horizon," that "Ægis of liberty" bobbed up serenely again.

The jury system is never even mentioned as one of the causes which led to the freeing of the slaves, and yet it is eloquently proclaimed the "bulwark of liberty."

Reform universally advocated.—Nearly all admit the present corrupt and inadequate condition of the jury system, and declare that reformation of the same is imperative. This system has existed in its present status for nearly five hundred years, and is more faulty now than ever. All the theory and application of modern educational facilities to improve it has been to no avail. One remedy alone remains. Abolish trial by jury in civil cases, and allow the courts to decide questions of fact as well as questions of law.

Irresponsibility of jurors.—Some men earn their livelihood by fees obtained as jurors, and occasionally a special panel is chosen from business men, who are in most instances compelled to serve against their wishes. You can readily see that juries must be either professional, or men who are impressed. Justice cannot be obtained under such circumstances. Jurors are irresponsible, and are not required to give their reasons. While this may be beneficial in criminal cases, it certainly aids fraud in civil cases. Jurors are more easily bribed than judges, because they are not held in so much awe, and are dismissed during intermissions, and only confined while deliberating concerning the verdict. Bribe one juror and it is sufficient, for it will cause a disagreement, and necessitate a new hearing of the case. It is almost universally the aim or all judges to decide correctly, for fear of a reversal of their decisions in the higher courts.

The eloquent appeals of counsel usually efface from the minds of the jury all recollection of the testimony of the witnesses, and as a rule this plan forms a basis for their verdicts.

Absence of jury in higher courts.—It is estimated that very nearly five-sixths of our civil suits are now tried before a judge

without a jury, and a jury is seldom demanded by the party who has been injured, but as a rule by the party causing the injury. The United States supreme and state supreme courts, where final decision is given in contested civil suits, do not allow a jury. Courts of admiralty, equity and probate try the facts without a jury. Judges give better satisfaction in deciding the facts, and that is the reason why they are gradually replacing the jury system. The judge system would be cheaper because it would save jurors' fees, and more expeditious by saving the time expended in selecting jurors, and prevent much useless haranguing. I am strongly of the opinion that the judge system in civil cases would be economical, more expeditious, more just and certain, and more satisfactory in every respect, and that the jury system in civil cases should be abolished, and the courts permitted to pass upon the facts as well as the law.

The bright rays of light are gradually disclosing to our vision a momentous period in our legal history, which no American can regard without interest, and few without prejudice. New discoveries in the vast field of judicature are rapididly being made, and the necessity of reform, and departure from precedent and tradition is apparent on every hand. The ineffectual, inexpedient and corrupt jury system, on account of the importance of its effects for good or evil, should claim our devoted and conscientious attention.

MAY ONE PARTY, BY THE RATIFICATION OF AN UNAUTHORIZED ACT OF HIS AGENT, BIND THE OTHER PARTY TO THE CONTRACT WITHOUT HIS ASSENT?*

J. C. MOORE.

To get this question clearly before us it will be well to look at a few cases where this question has come up for discussion. Let us begin with the case of *Dodge v. Hopkins*.[1] This was an action commenced Feb. 25, 1860, to recover payments alleged to be due on a land sale contract. The complaint alleges that in May, 1857, the plaintiff had through his agent W. F. Coolbaugh entered into a written contract under seal with the defendant, by which the defendant was to pay $1,880 for a certain piece of land in certain installments. It further appeared that the power of attorney to Coolbaugh had been executed by the plaintiff Dodge and his wife jointly, therefore it did not give power to sell the land in question which belonged to Dodge alone. Dodge, however, ratified the act of the agent on July 23, 1859, and he thereby became bound, for the first time, to the contract. The question now arose, Was the defendant bound? Could the plaintiff by his sole act of ratification make the contract obligatory upon the defendant? The court answered these questions in the negative on the following grounds.

Covenants in a contract must be mutual. The intention of the parties is that they be mutually bound, that each should execute the instrument so that the other could set up a binding contract against him and, if either neglects to so bind himself, the

* The question whether a principal may, by the ratification of an unauthorized contract made by his agent, acquire the right to enforce that contract against the other party to it, has given the courts considerable difficulty. To stimulate investigation of the subject, by the members of the junior class of the Law Department of the University, to whom he was lecturing on the subject of Agency, Mr. Mechem offered to give to that member of the class who should prepare the best thesis or brief upon the question, any legal text book which might be desired. A large number of papers were presented, many of them of unusual merit. Of these, that of Mr. J. C. Moore was deemed to be the best and is here presented. It has prefixed to it a digest or synopsis of its contents which is omitted here.

[1] 14 Wis., 686.

contract is void, and " When the instrument is void in its inception no subsequent act of the party who has neglected to execute it can render it obligatory upon the party who did execute without his assent." To the statement often made that the "adoptive authority relates back to time of transaction," and "subsequent ratification is equally effectual as an original authority " the court made some curious observations. He said these expressions had only a modified meaning, and he thought that these rules would hold good only when the ratification was shown as the basis of an action against him who made it, and so judgment was had for the defendant.

In the case of *Atlee v. Bartholomew*,[2] the plaintiffs brought suit on a land sale contract but lost the case: (1) Because the agent had accepted offer after the time in writing had expired, and extension by parol could not bind the defendant. (2) Lands were not sufficiently described in the transaction. And (3) If all other things had been favorable the defendants would not be bound because it appeared that the agent did not have the authority to bind the plaintiffs to the contract, and if they were not bound the defendants could not be, and the ratification by the plaintiffs could not make the contract binding upon the defendants without their assent. This is all that is necessary to be known of this case, as the court relied, as to their third point, upon the decision in *Dodge v. Hopkins*.

In the case of *McClintock v. Oil Co.*,[3] it appeared that the plaintiff, on Dec. 18, 1889, had obtained, from one Donaldson, for a valuable consideration, an option for the purchase of a certain piece of land upon certain payments and conditions. That her husband, Alex. McClintock, had agreed to sell the said option contract to the defendant company for $1,150, and had received $50 as earnest money. It was shown, however, that Alex. McClintock did not have authority to make such contract of sale, but that on Dec. 26, the defendant endorsed upon the back of said option a formal transfer and requested the said McClintock and his wife to sign and execute it. This they did in due form, and presented it to the defendant the next day. The defendant, however, refused to accept unless certain alterations were made, which could not be made, and by lapse of time the option vanished. Suit

[2] 69 Wis., 43.

[3] 146 Penn., 144.

was brought for damages. The question before the court was, Was there a valid contract? The court held, "If the agent had been properly authorized in the beginning the contract would have been binding on both parties, and it is a settled rule that ratification is equivalent in every way to plenary prior authority." The objection of want of mutuality is not good in many cases of dealing with an agent, for if he exceeds his authority, actual and apparent, his principal will not be bound, yet he may ratify, and then the other party will be bound from the inception of the agreement. The *aggregatio mentium* of the parties need not commence simultaneously. It must co-exist, but there must be a period when the question of contract or no contract rests on the will of one party to accept or reject a proposition made, and this interval may be longer or shorter. The offer, of course, may be revoked or withdrawn at any time prior to acceptance, but after acceptance it is too late. The contract is complete."

Let us now look at the case of *Bolton Partners v. Lambert*,[4] On Dec. 8, 1886, the defendant Lambert wrote to one Scratchley, agent for plaintiffs, offering to take a lease of a building upon certain conditions. On Dec. 15 the agent, with authority of "works' committee," accepted offer of Lambert, and on Dec. 17 sent him a draft of agreement of which Lambert did not approve, and on Jan. 13, 1887, he withdrew his offer, stating that he had been misled as to the property. On Jan. 17 "this suit was brought for specific performance." On Jan. 28, "the board of directors ratified the unauthorized act of the agent and works committee." By what seems to me as a questionable piece of logic the court arrived at the following conclusion. I think the proper view is that the acceptance by Scratchley did constitute a contract subject to it being shown that he had the authority to bind the company. If that were not shown there would be no contract on the part of the company, but when and as soon as authority was given to Scratchley to bind the company the authority was thrown back to the time when the act was done by him, and prevented the defendant withdrawing his offer because it was then no longer an offer, but a binding contract.

With these cases before us let us now make a short investigation of the opinions, and deduce if possible the most fair and reasonable common law rule. Oftentimes, in law as well as in

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[4] 41 Chan D., 295.

everything else, it is a safe plan when we meet with so many different views to choose a middle ground. So in this case I believe a judge would do well to adopt the rule laid down in *McClintock v. Oil Co*,, not only because it is the middle ground, but because believe it is good law and commends itself to reason more than the rules reached in the other case.

In *Dodge v. Hopkins* the court insists upon the mutuality of the other parties as being necessary to make a contract. In this he is quite correct, but he also says that one person cannot, by any act of his, bind the other party. To this I would answer in the words of the court in *McClintock v. Oil Co.* The *aggregatio mentium* of the parties need not commence simultaneously. It must co-exist, but there must be a time when the question of contract or no contract rests on the will of one party to accept or reject the proposition."[5] In parol contracts we can conceive of the two parties as mutually and simultaneously binding each other, but in contracts by mail or other medium, this simultaneity is impossible. It takes time to perfect such an agreement. In *Averill v. Hedge*[6] it was held that in an offer by mail, or messenger, the offer must be considered as making, during every instant of time the letter was traveling, the same identical offer, and the contract was completed by acceptance, and for that acceptance a reasonable time must be allowed.[7]

The court was correct when it held, in *Dodge v. Hopkins*, that a person could not wait and take advantage of the market and then by ratification bind the other party. But this is no argument against the binding force of ratification, for a party is never allowed this advantage in accepting an offer.[8] I believe this point had much weight with the judge in the above mentioned case for, although more time is allowed in contracts concerning real estate[9] than in business contracts,[10] still two years and three months (which was the time between contract by agent and ratification) ought not to be considered a reasonable time within which to accept an offer or ratify an unauthorized act. This point alone would support the decision in this case. It was also intimated in *Dodge v. Hopkins* that a subsequent ratification could only be used as the basis of an action against him who made it.[11] When

[5] See p. 6. [6] 12 Conn., 421.

[7] Langdell's Summary, § 153.

[8] Langdell's Summary, § 152, and cases there cited.

[9] Thorn Prow v. James, 18 Dunlop, 1.

[10] Dunlop v. Higgins, 1 H. L. C, 381. [11] See p. 3.

is the mutuality in this rule for which the court was striving? If that was true the one who ratifies never could have an action on the contract, while the other party could enforce or break the contract at will; in other words, there could be no bilateral contract. Mutuality surely cannot be obtained by such a rule. In this case the court further says that where one party is not bound by the contract in its inception, the contract is void, and a contract void in its inception no subsequent act of the party who has failed to execute it, can render it obligatory upon the other without his assent.[12] The word "voidable" should be here used for "void," I think, for a contract void in its inception never can be made good.[13]

Now is the assent of the other party necessary? The position of the two contracting parties here is very similar to the position of the parties to an ordinary contract. The person dealing with an unauthorized agent may with reason be considered as making an offer to the principal, and the ratification of the principal will then act as an acceptance of the offer. The person dealing with the agent says, "I will buy so much stock on certain conditions." The agent then communicates to his principal and the principal may then accept the offer (i. e. may ratify) or reject the offer (i. e. may not ratify) as he desires. By making this transposition we may apply to these parties the rules and laws which govern ordinary bilateral contracts.

Now it is a settled rule of law that the acceptance of an offer need not have the subsequent assent of him who makes the offer in order to bind him,[14] and it is even held in some cases that notification is not necessary,[15] but the Massachusetts rule requires notification.[16] What reason is there, I would ask, why assent should be necessary after ratification more than after acceptance? If the person who has made a contract with an agent firmly believed that agent had authority he has doubtless relied upon the fulfillment of the contract in all his subsequent dealings, and what need is there of obtaining his subsequent assent to its fulfillment if made within a reasonable time? Subsequent assent is not necessary in a

[12] See p. 3.

[13] Trueblood v. Trueblood, 8 Ind., 195.

[14] Langdell's Summary, §§ 13-16.

[15] Vassar v. Camp., 1 Kernan, 441.

[16] McCulloch v. Eagle Ins. Co., 1 Pickering, 278.

simple contract.[17] Since the law would favor no individual more than another, why should the other party be allowed to complete the contract rather than the principal? And if the assent of the other party must be obtained, why not the subsequent assent of the principal? And we might go on *ad infinitum* as the court has pointed out in *Adams v. Lindsell.*[18]

Now suppose the person dealing with an agent is doubtful of the agent's authority. In such a case his contract with the agent, as far as concerns the principal, is a real offer to the principal, for he knows that the principal may not accept or ratify the terms, and he is also presumed to know the legal effects attending the dealing with an unauthorized agent.[19] Upon what ground, then, can he demand more rights or privileges than the ordinary person making an offer? The assent of the ordinary offerer is not necessary to bind him, and in some states notice is not even necessary.[20] Again, suppose a person has made a contract with an agent whom he then supposed to have authority but has subsequently learned that the agent acted without authority. Ought he then to be bound to the contract?

Let us consider this question under three heads; (1) Suppose the unauthorized act be ratified immediately, or rather, say within a very short time, and the other party be so notified. Although the other party during this time may have learned of the agent's incapacity, still he could not have been the loser thereby, for the conditions are practically the same as when the contract was made. He ought therefore to be bound to the contract. (2) Now suppose the act has been ratified within, but near the end of a reasonable time. Is the contract binding? If, during this time, the other party has learned of the agent's authority he has the power and privilege, in accordance with the rule laid down in *McClintock v. Oil Co.*, to withdraw from or revoke the contract. If he does so withdraw he is not bound, if he does not, he fails to use the privilege given him, he is at fault for not so doing, and should therefore be bound by the terms of the contract. (3) Suppose the ratification be made after a reasonable time has expired. Is there a binding contract? I believe there is not. The decision in *Bolton v. Lambert*, however, would support such a contract, but I believe this rule is not a good one, for, after making the transpositions heretofore suggested[21] we find that although there

[17] See p. 12 and note 1. [18] 1 B. and A., 681.
[19] Every one is presumed to have knowledge of the law.
[20] See p. 15 and note 2. [21] *Supra*, p. xx.

was a good offer, it was not duly accepted within a reasonable time, nor until the offer was withdrawn. to say that a person was bound to a business contract for thirty days before the other party was bound, or that the defendant was bound before the unauthorized act was ratified—for suit was commenced eleven days before ratification was made—is in my mind contrary to all fairness and to all laws of contracts. At the time the suit was commenced there was no ratification, i. e. the plaintiffs were not bound, and therefore there was, at the commencement of the suit, no valid contract upon which suit could be brought. I fail to see the justice in the decision. I cannot see how the case can be supported.

The case of *McClintock v. Oil Co.* is the only one stated in which the question before us has come squarely and fairly before the court, for in *Dodge v. Hopkins* the ratification was not made within a reasonable time, since two years and three months had intervened since the contract was made. In *Atlee v. Bartholomew*, even if the agent had been authorized there could not have been a good contract, because (1) land was not sufficiently described, and (2) extension of time by parol in land contract is not binding, and therefore (3) is an *obiter dictum* and consequennly of little weight. The decision in *Bolton v. Lambert* follows the case of *McClintock v. Oil Co.*, but goes so much further that I cannot support it.

The rule in *McClintock v. Oil Co.* is also in harmony with the rules of the civil law,[22] and is supported by them. A bilateral contract of the common law would usually come under the head of "obligations to conscience," and would be classified under one of the subdivisions. All that was necessary to create the "vinculum jures" in contracts "ex consensu" was the consent of the parties expressed by word or action, and either by themselves or through others for them, together with some underlying economic transaction or "causa civilis." In the case of *McClintock v. Oil Co.* all these requirements are fulfilled, and I think a Roman judge would have given a like decision had the case come up before him. However, as this division of obligations in Rome grew up under the "jus gentium" and gave rise to "actiones bonæ fidæ," we cannot find out what were the laws or modes of procedure which governed this division of contracts and actions (as we can

[22] See Institutes of Justinian, Lib. III, Tit. XXII, *et seq.* Also Commentaries on Institutes of Justinian, by Sanders, pp. 361-370. Also see Sohm's Roman Law, § 69 *et seq.*

those of the older divisions which gave rise to "actiones stricti jures,") and therefore our analogy to the civil law must be quite limited and somewhat uncertain.

In summing up the results of our investigation we find that we may make the following statements: The rule of law laid down in *McClintock v. Oil Co.*, that is, a principal by ratifying within a reasonable time the act of his agent may, unless the other party has withdrawn or revoked the contract, bind that other party without his subsequent assent, has been shown to be the most reasonable of the three rules considered. It conforms to and is in harmony with the rules governing ordinary contracts. That the case of *McClintock v. Oil Co.* is the only one stated wherein the question at hand received the undivided attention of the court, and that the rule is in harmony with the rules of the civil law.

From these facts we cannot but conclude that this rule is the best one and the most just and, consequently, should be supported, as against the others set forward, and followed as a rule of law.

NOTES.

IS BEER AN INTOXICATING LIQUOR?—Although in common parlance it is generally understood that it is, nevertheless the supreme court of South Dakota[1] have held that this must be shown by evidence, the weight and sufficiency of which is for the court or jury, as the case may be, and that a court will not take judicial notice that beer is a malt or intoxicating liquor, in the absence of a statute declaring that it shall be so deemed.

HE SHOULD BE DISBARRED.—It is not often that anything can be said to the discredit of the bar of Grand Rapids, but it can hardly be claimed that it has performed its duty to the public in permitting Attorney Donaldson to retain his membership as a lawyer in good standing at the bar of Kent county. It has been fully established that Donaldson is guilty of defrauding a client, is consequently unworthy the confidence of the public, and should be denied the privileges of an attorney-at-law. The bar of Kent county has a clear duty to perform in this case. If this man is permitted to practice law, and should defraud other innocent clients or commit further crimes, the moral responsibility for his acts will rest in large part upon the lawyers of Grand Rapids who were derelict in not disbarring him when he was proven guilty. It is failure to act promptly in cases of this kind that casts odium upon the profession. Unless prompt investigation and immediate disbarment follow the publication of the guilt of attorneys the public are encouraged in the already too general modern impression that lawyers are all unscrupulous and cunning men. The good men of the profession suffer for the criminal acts of unprincipled members, unless the guilty ones are punished before the public lose faith in the integrity and honesty of the profession as a whole.

The Kent county bar should lose no more time in bringing charges against Donaldson. He should be given a hearing—every one is entitled to that—and if found guilty of the unprofessional conduct ascribed to him, should be disbarred without delay.

BARBER SHOPS MUST CLOSE ON SUNDAY.—The lawyer who has been in the habit of getting his Sunday shave will hereafter be obliged either to forego the convenience or assist his tonsorial

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[1] State v. Sioux Falls Brewing Co., et al ,(March 3- Fuller, J.) 58 N. W. Rep., 1,

artist in breaking or evading the law. The supreme court[1] have upheld the law passed by the last legislature,[2] prohibiting the opening of barber shops or engaging in the business, etc., on Sunday. One Michael Bellet was convicted in Detroit of breaking this law. He appealed to the supreme court, claiming the act to be invalid because in conflict with Art. 6, § 32 of the state constitution, which provides among other things that no person shall be deprived of life, liberty or property without due process of law. His counsel contended also that the law was in violation of the fourteenth amendment to the constitution of the United States, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the protection of the laws." The court held, however, the statute to be one which the state, in the exercise of its police power, has the right to enact; that it cannot be deemed open to objection as class legislation; and that it is not in conflict with the state constitution, nor with the fourteenth amendment to the constitution of the United States. The conviction was therefore affirmed and the lower court directed to proceed to judgment.

LAWYERS AND THE INCOME TAX.—Among the profession it will not be thought that the proposed income tax will bear very heavily. Among the "laymen," however, who are in the habit of remembering only the seemingly large fees received in an occasional case, and who forget the long intervals between times, the opinion seems to be that the lawyers will be quite generally subject to its tolls. It will not be the fear of having to contribute many of his hard earned dollars to replenish a depleted treasury that will cause the average lawyer to object. The collector of the income tax will necessarily be a very inquisitive person. In his inquisitiveness he will be backed up by a United States statute. With this official probing into the books and affairs of his office it will be difficult for an attorney to guard the legitimate professional secrets of his clients. Again, while the exact amount that his income is found to be may not be made public, it will be known whether or not it exceeds a certain sum. It is this inquisitorial examination into the affairs of their office and into the amount of their income that the members of the bar will resent. To them it will not be a question of party policy nor of political expediency.

EFFECT OF THE SATURDAY HALF HOLIDAY LAW UPON MATURITY OF NOTES.—One or two interesting questions have arisen,

1 People v. Bellet, Feb. 20. Montgomery, J.
2 Pub. Acts 1893, p. 238.

and been quite widely discussed, ever since the passage of the law making Saturday a half holiday. The act[1] provides among other things that "every Saturday from twelve o'clock noon to twelve o'clock at night, which is hereby designated as a half-holiday, . . . shall, for all purposes whatever, as regards the presenting for payment or acceptance, and the protesting and giving notice of the dishonor of bills of exchange, bank checks and promissory notes, made after the act shall take effect . . . be treated as the first day of the week, commonly called Sunday, and as public holidays or half holidays; and all such bills, checks and notes otherwise presentable for acceptance or payment on any of the said days shall be deemed to be payable and presentable for acceptance or payment on the secular or business day next succeeding such holiday or half holiday: provided, that in construing this section, every Saturday, unless a whole holiday as aforesaid, shall for the holding of court and the transaction of any business authorized by the laws of this state, be deemed a secular or business day." The question which has bothered lawyers and bank officers most is when, under this law, are notes maturing on Saturday or Sunday presentable for payment? This the supreme court have very clearly answered in *Hitchcock v. Hogan*.[2] They hold that notes, etc., falling due on Saturday are presentable for payment and payable on Monday, unless it be a legal holiday, in which case, on Tuesday. Those maturing on Sunday are payable on Monday also, for the reason that prior to the enactment of this law, notes which by their terms matured on Sunday were presentable for acceptance or payment on Saturday, and by the terms of the act such notes as are otherwise, i. e. but for the act, presentable for acceptance or payment on Saturday are thereafter payable on Monday.

THE ITINERANT JUSTICE.—The bar of Western Michigan have just witnessed a rather unique proceeding in the case of a justice of the peace of Grand Rapids, who is seeking admission to the bar without examination. The term of the justice is soon to expire, and it is his wish to then hang out his shingle and commence the practice of the law. Like a large percentage of the justices of the peace everywhere, this justice was never admitted to the bar. He is not an attorney-at-law, but thinks that his long service on the justice's bench qualifies him for practice before the courts. The justice was unwilling to stand the examination, but determined to adopt the hitherto untried expedient of a petition to the circuit court to admit him without examination. Everybody knows how easy it is to secure names to a petition of any kind, and everybody knows how difficult, and, at times, how embarassing it is to decline to sign a petition, especially when the petitioner, in person, presents it. The justice in question circulated his peti-

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[1] Pub. Acts 1893, p. 299.

[2] Feb. 20. Montgomery, J.

tion industriously and secured the signatures of between forty and fifty members of the Kent county bar, many of them attorneys of widely recognized ability and reputation. The justice lost no time in presenting his petition, confidently, to one of the judges of the circuit court of Kent county, and be it said to the everlasting credit of that circuit judge, it was promptly denied. We do not intend this emphatic endorsement of Judge Adsit's action as any reflection upon the justice in question. Not having examined the justice, we cannot pretend to pronounce upon his fitness for admission to the bar. But we cannot condemn, in too strong terms, the method adopted by him to secure admission. If it was not a notorious fact nowadays that petitions mean absolutely nothing, we should condemn the signers of the justice's petition as strongly as we have endorsed the course pursued by the circuit judge.

The justice of the peace did not rest satisfied with his experience in Judge Adsit's court, so, according to the reports of the secular press, he at once betook himself to Lansing, with a regularly retained attorney, to seek admission to the bar of the supreme court of the state. The inference is that he met with no better success there, for the next we hear of him is that he had turned his face towards Newaygo to try his luck in the circuit court of that county. The justice is lost sight of there, and whether he will succeed in securing admission to the bar somewhere within the confines of the state of Michigan, we cannot even conjecture.

This little incident is an encouraging sign of the tendency of the state judiciary to surround admissions to the bar with greater safeguards than have prevailed in the past. Whether it is a result of the recent convention of circuit judges, or whether it is traceable to the influence of the state bar association, we do not pretend to say, but we do hope that in the light of the Donaldson incident, the action of the supreme and county judges will prove a beneficial object lesson to the Kent county bar.

LAW SCHOOL NOTES.

E. F. JOHNSON, EDITOR.

H. C. WALTERS, ASSISTANT.

Clinton McAllister, '93, has gone to California.

T. G. Clark '95, has gone to Oklahoma to practice.

D. R. Anderson, '90, is superintendent of the schools of Grundy Co., Ill.

The University Press association will give a banquet after the spring vacation.

The S. C. A. members of the law department held a social at Newberry hall on Saturday evening, March 24.

W. E. Cort, J. W. Largent and J. C. Huntoon, of the class of '91, have gone into partnership at Lewiston, Mont.

Messrs. Lock, Friedman, Messic, DeRau and Clark went down to Ohio March 7, and passed the state bar examination.

S. V. Weil cut off the point of his finger on Monday, March 5, while sharpening his pencil to do some drawing for *To-Wit:*.

The first jury trial was held in the practice court on Wednesday, March 7, when a flash-light photograph was taken for *To-Wit:*.

A. G. Smith, '90, is prosecuting attorney of Missaukee Co., Mich., John V. Morgan, of Otoe Co., Neb., and Conrad Wolfe, of Howard Co., Ind.

B. F. Wollman, '94, entertained his brother Henry Wollman, of Kansas City, president of the Southwestern alumni association, for a few days recently.

The department of literature, science and the arts will hereafter hold a summer term for the benefit, in the main, of superintendants and principals of schools. The term will begin Monday, July 9, and close Friday, Aug. 17.

The forthcoming calendar will show the number of students enrolled to be distributed as follows: Literature, science and the arts 1,427; medicine and surgery 382; law 607; pharmacy 60; homœopathic medical college 27; college of dental surgery 185.

The final oratorical contest was held in University hall on Friday evening, March 16. F. P. Sadler, lit. '95, won first place and B. L. Oliver, law, '94, took second place. F. E. Chamberlain and Mr. Oliver represented the senior law class, and J. N. Davis the juniors.

At the regents' meeting on Wednesday, March 21, some important business was transacted. It was decided to spend $1,000 of the general library appropriation in putting in new books in the law library; to change the inscription over the entrance to the gymnasium to "Waterman Gymnasium," and to complete the gymnasium at once; and to raise the tuition fee in all departments $5.

The Republican club has elected the following officers: President, J. J. Sheridan, '94; vice-president, H. M. Zimmerman, '95; secretary, John Q. Adams, '94 lit.; treasurer, J. W. Dasef, '95 lit. The following members will go as delegates to the convention of the American Republican College League to be held at Syracuse: F. C. Kuhn, H. H. Patterson, G. W. Fuller, F. W. Newton and G. H. Leonard.

A special course of lectures will be given the students of the department, which will deal with the purely practical side of legal work. The subjects have not all been announced, but two of them are known. Prof. Mechem will speak on "Authorities." He will give their relation, weight and history. Prof. Kirchner will talk on "Preparation for trial." The course is voluntary, the lectures being delivered in the evening.

On Monday evening, March 19, Dean Knowlton lectured before the Inland League on "Some curious phases of the marriage laws." He divided the subject into the following heads: I. The promise, II. The marriage contract, III. The marriage status, IV. Property rights, V. Divoces. He spoke of the curious phases of the law in different states and called attention to the inconsistencies and incongruities arising out of the present system. On account of the importance of the marriage relation the professor thinks the law of domestic relations should be studied in all colleges.

MONTHLY DIGEST OF MICHIGAN DECISIONS.

APPEAL—Bond—Liability of surety.—The liability of surety on a bond on appeal cannot be enlarged either in amount or subject matter of the litigation; and a judgment, though valid in its entirety as to the principal defendant, cannot be rendered against the surety for more than the penalty. Vreeland v. Loeckner. Grant, J.

ASSUMPSIT—Declaration—Actions by assignee for benefit of creditors. —The declaration in an action of assumpsit by an assignee for the benefit of creditors for goods sold and delivered by the assignor should allege that the defendant is indebted to the assignor for the goods, and that the claim of the assignor has been assigned to the plaintiff. Powell v. Williams. Hooker, J.

ASSUMPSIT—Sale—Evidence—Alteration—Questions of fact.—In action on a dishonored check, given for goods sold to defendant, evidence that there were no funds in the bank to pay it is admissible to rebut the claim that payment was stopped because of failure to furnish a bill of lading. Evidence of alteration of receipt subsequent to signing is admissible. Whether or not goods were sold subject to lien is a question of fact properly submitted to jury. Cullen v. Detroit Tug and Wrecking Co. Long, J.

BILLS AND NOTES—Maturity—When notes maturing on Sunday presentable for payment. Under Act No. 185, Pub. Acts 1893, making Saturday afternoon a legal half-holiday for certain purposes and under certain conditions, notes maturing on Sunday are presentable for payment or acceptance upon Monday. Hitchcock v. Hogan. Montgomery, J.

CARRIERS—Ejection of passengers.—A conductor who has rightfully taken a passenger from his seat for non-payment of fare and is proceeding to eject him, is not obliged to again demand the passenger's ticket; but if an offer to surrender the ticket be made before the ground is reached the conductor should receive it, and if he negligently, carelessly or wilfully prevents the passenger from surrendering his ticket, the ejection is unlawfully made. Ferguson v. M. C. R. R. Co. McGrath, C. J.

CONTRACT—Equity jurisprudence—Non-performance—Equity has jurisdiction to rescind a contract for non-performance.—Where a water company has contracted to furnish a city with a sufficients supply of pure water for domestic purposes and for fires, and a test of the works shows the pressure to be insufficient, and the water to be impure, and the city council has refused to use the water, the company has not performed its contract, and the city is entitled to a recision of the contract. City of Grand Haven v. Grand Haven Water Works. Long, J.

CONTRACT—Parol agreement amounting to agreement—Specific performance.—Where there has never been an understanding as to the sale of the land amounting to a contract specific performance and accounting will not be granted. Stever v. Torrent, et al. Hooker, J.

CONSTITUTIONAL LAW—Closing of barber-shops on Sunday—Police power.—Act No. 148 Pub. Acts. 1883, prohibiting barbers from conducting their business on Sunday, is within the police power of the state, and not in conflict with the state constitution, nor with the 14th amendment to the constitution of the United States. People v. Bellet. Montgomery, J.

CONSTITUTIONAL LAW—Delegation of legislative authority.—Act No. 207 Pub. Acts 1893, (popularly known as the "Jag-cure Law,") is unconstitutional for the reason that it permits unofficial persons to prescribe rules which shall acquit persons charged with crime. The legislature may not delegate to private corporations the power to make laws for the discharge of offenders. Senate of the Happy Home Club of America v. Board of Supervisors of Alpena County. Per Curiam.

CRIMINAL LAW—Information, objections to form—When deemed to have been waived on appeal—Sentence.—Objections to form of information cannot be made upon appeal when it was not raised in court below, and pleas of not guilty entered. The discretion of trial court in fixing sentence will not be reviewed. People v. Kelly. Grant, J.

CRIMINAL LAW.—Justice court—Adjournment—Waiver of jury.—A justice may adjourn trial within reasonable limits on request of prosecuting attorney. A jury trial is deemed to have been waived when defendant announces that he will put in no defense and leaves the question of jury to the court. People v. Weeks. Grant, J.

CRIMINAL LAW.—Legality of statute—Waiver.—The legality of an act, under which a defendant has been convicted and pleaded guilty, cannot be questioned on ground that it was read by its title only upon first and second reading before the legislature, if the objection is raised for the first time on appeal. People v. Luby. Grant, J.

DAMAGES—Closing of streets, when special damage not shown.—The damage caused a property owner by the closing up of a street in the next block, whereby access to his property is made less convenient, which is the "same kind" of damage sustained by all other persons in the city that go that way though the inconvenience he may suffer be greater than to other persons, does not give him a right of action. Buhl v. Depot Co. Montgomery, J.

DISCHARGE OF GUARDIAN—NOTICE.—On application for discharge of one adjudged an incompetent, notice must be given, although there is no statutory provision therefor; and notice having been served only on the guardian, mother and sister, though directed to be served on another sister and the wife, the application will not be heard. Storms v. Allegan Circuit Judge. McGrath, C. J.

EQUITY.—Bill to grant title—Demurrer—Misjoinder of parties—Adequate remedy at law—Amendment.—A bill will not be dismissed on demurrer on ground that the trust therein alleged rests in parol unless it so appear upon the face of the bill. Only those can demur, for misjoinder of defendants, who are improperly joined. The right to bring ejectment is not such an adequate remedy at law as will deprive one who has been forcibly evicted of bringing a bill to quiet title. A bill which can be remedied by simply striking out objectionable features should not be dismissed without allowing amendment. Bigelow v. Sandford, et al. McGrath, C. J.

EVIDENCE — Deed, recitation of facts in, when party introducing bound by.—A party introducing a deed in evidence, which recites certain

facts in favor of the other contending party, is *prima facie* bound by such recitation of facts. Smith v. Ryerson. Montgomery, J.

EXEMPTIONS—Waiver—Evidence—Instruction.—Where a writing, upon its face, is a clear waiver of exemptions, and is not qualified by evidence tending to show a contrary intention, the trial judge should so instruct the jury, unless there be evidence that the instrument is secured by deception or fraud, which must appear upon the record. The writing must be treated as evidence of waiver unless contradicted or qualified by legitimate evidence tending to break its force. Rich v. French, et al. Hooker, J.

FIRE INSURANCE—Conditions in policy not known to insured—Evidence, when question for court.—An insured is bound by terms in policy of fire insurance which he fails to read, and which are not brought to his knowledge, when there has been no misrepresentation or attempt to conceal on part of agent of the company. When but one conclusion can reasonably be drawn from he evidence it becomes a question for the court and not for the jury. Wierengo v. Amer. Fire Insurance Co. Grant, J.

GARNISHMENT—Liability of garnishee—Householder—Exemption of wages.—A garnishee proceeding being purely statutory, the garnishee to protect himself from an action by his creditor must proceed strictly in conformity therewith. Before paying money into court in advance of adjudication he must determine at his peril whether or not the principal defendant is a householder; and a householder may recover his exempt wages, under How. Stat., § 8032, from the garnishee notwithstanding such payment. Crisp v. F. W. & E. R'y Co. Hooker, J (Long and Grant, JJ. dissenting.)

GARNISHMENT—Non-resident defendant—Jurisdiction—Praecipe and summons—Affidavit.—Where a principal defendant is a non-resident or foreign corporation to obtain jurisdiction in the principal case that fact need not be alleged in the praecipe or summons in garnishment proceedings, in order to obtain a jurisdiction in the principal case. An affidavit for garnishment by plaintiff is sufficient if it alleges that he is apprehensive of loss unless writ issue (Weimeister v. Manville, 44 Mich., 408, distinguished). Williams v. International Grain & Stock Board. Grant, J.

HUSBAND AND WIFE—Conveyance to secure debt of husband—A wife may deed her property to whom she chooses, and though it is security for or in payment of her husband's debts, the deed is valid. LeMay v. Wickert. Hooker, J.

INTOXICATING LIQUORS—Sale by agent—When license required.—A person is not exempt from payment of beer tax, in selling that liquor, though he have a contract with a brewery firm, stating that he is their agent for the sale of the beer in a particular locality, and stipulating that he is to receive a certain commission on all sales made by him. People v. Newman. McGrath, C. J.

INSANE PERSONS—Suits by county for support in asylum—Declaration, sufficiency of.—The declaration in a suit by superintendents of the poo- of a county, to recover for money paid for support of an insane person in a state asylum against the relatives chargeable therewith, is sufficient if it contain the usual money counts. It need not be affirmatively shown that the rate of charges was legally fixed, the order of the steward of the asylum on the county treasurer being *prima facie* proof of its cor-

rectness. Supts. of Poor of Washtenaw County v. Rabbitt. Montgomery, J.

MANDAMUS—Reference to circuit court—Finding on questions of fact.—A mandamus will be granted when it appears from the record that the lower court to which the cause has been referred to ascertain and determine the questions of fact, has reached the correct conclusion. Haines v. Supervisors of Saginaw Co. Long, J.

MASTER AND SERVANT—Injuries by defective machinery—Declaration.—A declaration in an action for damages for injuries caused by defective machinesy must explicitly allege due care upon the part of the plaintiff and negligence on the part of the defendant; and they must be alleged not in general terms, but by setting forth the specific acts which tend to show both the negligence and failure of the master, and the exercise of due care by the servant. Torongo v. Salliotte, et al. Grant, J.

MORTGAGE—Foreclosure—Bona fide holders.—In a suit for foreclosure, when the findings are adverse to defendant on his claim of alteration in the mortgage after execution and failure of execution, and he has no claim which he could set off were the suit by the mortgagee, it is immaterial whether complainant be a bona fide purchaser or not. Detroit Savings Bank v. Galvin. Long, J.

PARTNERSHIP—Construction of agreement—Power of one partner to make promissory notes.—One who has been made managing partner by co-partnership agreement, authorizing him to apply the proceeds, *inter alia*, to the payment of pre-existing debts of another partner, cannot bind the firm by a note given in payment of one of such debts. Whitla v. Buller's Estate. Hooker, J.

PLEADING AND PRACTICE—Parties—Minors—Guardians *ad litem*.—Where a guardian *ad litem* has been appointed by the court, and such appointment is in accordance with the statute, the parties concerned cannot afterwards refuse to plead upon the ground that the infants' rights are not protected. Peck, et al., v. Kent Circuit Judge. Grant, J.

PLEADING AND PRACTICE—Demurrer—Receivers—Actions against receivers.—A bill in chancery, in which a receiver is made defendant, must show that authority has been granted to bring suit against such receiver. The failure to show this, being a substantial defect, may be shown by general demurrer. Steel Brick Siding Co. v. Muskegon Machine & Foundry Co. Hooker, J.

PLEADING AND PRACTICE—Misnomer of defendant—Amendment—Trial on amendment, correcting misnomer of defendant who has appeared by counsel will be permitted when it does not change the party. A criticism of the conduct of counsel is within the discretion of the trial judge which will not be interfered with unless abused in such a way as to cause palpable injury. Tuller v. Ginsburg. Hooker, J.

PLEDGE—Assignment.—An assignment of a pledge by pledgee, which does not affect the position of pledgor or his right to redeem, is valid though payment is not first demanded of the pledgor notice given him that such assignment is to be made. Drake v. Cloonan. Montgomery, J.

PRACTICE—Action for penalty—Direction of court to find—When jury to determine penalty.—In determining a penalty, of which only the maximum amount is fixed by statute, the jury should determine the amount of the penalty when the court has directed a verdict for the plain-

tiff; but the fact that the court has fixed the amount of the penalty will not be deemed ground for reversal if plaintiff waives recovery of the amount of the penalty, above six cents and remits all above that sum. Hines v. Darling. Long, J.

PROBATE—Administrator's sales—Liability of purchaser who refuses to complete purchase—How held for loss at re-sale.—To render a purchaser at an administrator's sale, who has refused to complete the purchase, liable for deficiency on a re-sale, it must be shown that the sale has been duly reported and confirmed, and a deed tendered to the purchaser. Pierson v. Fisk. Grant, J.

PROBATE COURT—Accounting—Allowance of claims.—A claim by an executor in his accounting which has been admitted at a specified sum by the heirs in their request to the probate judge for finding of facts, cannot be contested on appeal on the ground that it has not been presented and formally allowed. Hopkins v. Hopkins, et al. Long, J.

PROBATE COURT—Jurisdiction—Claims of state against insane persons for support in asylums—Statute of limitations—Admission to asylum. —A probate court has jurisdiction to pass upon claims against a ward before payment by guardian. The statute of limitations applies to claims by state for support of insane persons in a state asylum. An admission to an asylum under Comp. Laws, 1871, § 1934, was legally made if the certificate issued by that act was mas made and acted upon, though the probate judge fail to thereafter enter the order provided for by the act. State v. Dunbar's Estate. Montgomery, J.

PROBATE COURT—Right to set aside orders—ante-nuptial agreement —Legacy in lieu.—A judge of probate cannot set aside his own adjudication and grant re-hearings. A decedent cannot, by legacy in lieu thereof, postpone the payment of a valid claim upon an ante-nuptial agreement, until the payment of all other creditors. Hitchcock v. Probate Judge of Genesee County. McGrath, C. J.

PROBATE COURT—Who may appeal—Questions for court.—The father of an infant cannot appeal from an order, made on application of the guardian, granting license to lease the infant's property. The question as to expediency, on appeal, is for the court to determine. Cook v. Cook's Estate. Long, J.

PROMISSORY NOTES—Payment—Questions of fact—Evidence.— Whether or not a transaction was intended as payment of promissory notes or as security therefor is a question of fact, the findings upon which, on conflicting evidence, will not be disturbed on appeal. Child v. Emerson, et al. Grant, J.

RAILROAD COMPANIES—Conveyance of government lands to.—The conveyance of lands to a railway company by the United States upon condition, vests an interest in said company, and whether the title to the railway company is defeasible for any default on its part or not, they are no longer subject to sale by the federal government. Crapo v. Town of Troy. Montgomery, J.

RAILROAD CROSSINGS, injuries at—Evidence as to giving of signals.— The evidence of witnesses who have testified that signals were not given cannot be strengthened by showing that the fact was subsequently talked over on the same afternoon by them; but it is not error, upon objection being made to a question, to permit counsel to state the purpose of the question. A witness who has testified that he heard the whistle from the

place where he worked every day previous, may be permitted to testify that he heard no signal on the day of the accident, when it has been shown that the wind was at the time blowing in his direction. Sanborn v. Detroit, B. C. & A. R. R. Co. McGrath, C. J. (Grant and Long JJ., dissenting.)

RECEIVER—Suits against—When necessary party.—The receiver of a contracting party is a necessary party to a bill in a suit by the other contracting party. A receiver cannot be sued without leave of the court appointing him. Burk v. Muskegon Machine & Foundry Co., et al. McGrath, C. J.

STATUTE OF LIMITATIONS--Part payment--Evidence.--It is proper to submit to the jury, as evidence of part payment, a letter written by defendant some time after the part payment was alleged to have been made, asking for a statement of account, and acknowleging that he had paid some of the account. Floersheim v. Vosburgh. Long, J.

WORLD'S COLUMBIAN EXPOSITION--Appropriations for--"Historical report."—The act of the legislature making an appropriation for erecting a building and making a state exhibit, etc. at the World's Columbian Exposition. does not authorize the expenditure of any portion thereof, nor of the proceeds of from the sale of the building or other property belonging to the state, for an "historical report of Michigan at the World's Fair." Flynn, treasurer, etc., v. Turner, auditor general. Hooker, J.

BOOK REVIEWS.

MCKELVEY ON COMMON LAW PLEADING.—A Brief Explanation of the Different Forms of Common Law Actions. and a Summary of the most important Principles of Pleading Therein, with Illustrations taken from the Cases. By JOHN JAY MCKELVEY, LL. B., A. M., of the New York Bar. New York: Baker, Voorhis & Co. Small 8vo. vol. Cloth. $2.00 net.

There are a great many authors who have written upon the subject of common law pleading. None have written at greater length or in greater detail than has Chitty. Gould and Stephen have written with lesser detail than Chitty, and perhaps with greater certainty—surely with more clearness. This, the latest work upon the subject, we have read with great care and interest, and we confess great admiration for the ability with which the author has accomplished the difficult task of writing a small book upon so large a subject. We feel safe in saying that it will prove of inestimable value to the student of common law pleading. It is a clear and concise statement of the law of pleading, unencumbered with long forms which mean absolutely nothing to the student and go without explanation even by the old practitioner, and which serve no purpose but to confuse his mind. It would be a benefit to every law student to put this volume into his hand and make it his constant companion during his entire professional studies. It cannot fail to be of great service to the student in the prosecution of his investigations, and the practitioner at the bar will find it a most convenient and helpful book of reference for general principles. It has been prepared with great care and judgment and we do not doubt that it will be generally received as an acceptable and useful contribution to the subject of which it treats.

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*CORPORATIONS IN MICHIGAN.**

ALFRED RUSSELL.

Nothing is more surprising than the growth of corporations in the United States and in this state. During the period between the adoption of the Massachusetts constitution and the federal constitution only one corporation was created by that state which was then nearly foremost in wealth and population. A hundred years later and four-fifths of the business of the country was done by corporations and they now hold four-fifths of the property of the country, as stated by Mr. Justice Field.[1]

The increase of corporations in Michigan has been in the same proportion. But few were formed before our present constitution which was adopted in 1850. Prior to that date, with one exception, corporations could be created only by special act, passed by a vote of two-thirds of both houses of the legislature. The exception was as to religious corporations, by the act of April 3, 1807, under which any person might organize, by signing and recording articles of association. This is the earliest example in the United States, except a statute of the same character in Pennsylvania, in 1794, of creating corporations in this way, a method which is now universal. "The holy apostolic and Roman Church of Saint Anne of Detroit," founded in 1701, was incorporated under this act of 1807.

Before 1850, we had about forty-five mining corporations; seven or more railroad corporations; a few banking corporations; several plank road corporations, and a few of a miscellaneous

*President's address before the Michigan Political Science Association, at its meeting in Jackson, March, 1894, (the topic being selected at the request of the society.)

[1] 134 U. S., 742.

character, all, of course, under special charters. The corporate rights and charters of all these corporations were continued by Article 2 of the schedule to the new constitution of 1850, and quite a number of the above named charters are still in existence. These charters contained differing privileges and obligations. Charters of the same kind varied as to the powers which might be exercised as to taxation, as to the amount of land which might be held, as to liability of stockholders, and as to duration of existence. In at least one case a perpetual charter was enacted. In some cases the power to alter, amend, or repeal, was reserved by the legislature, and in some not. I may here observe that, in the celebrated Dartmouth College case,—decided in 1819 by the federal supreme court, holding that a private corporate charter granted by the government, and accepted by the corporation, constitutes a contract which the legislature cannot change,—Judge Story, in his concurring opinion, suggested that the power to control, or destroy, corporate rights might be reserved by the legislature in the grant itself. This suggestion was afterwards very generally acted on by legislatures, and takes away many of the evils commonly attributed to that case. Our new constitution of 1850 ordains that all laws concerning corporations may be altered and amended or repealed.

In 1838 our legislature adopted general provisions, mainly administrative in their character, applying to all corporations except where special enactments exist; and those general provisions, with a few changes, are still in force as Chapter 191 of Howell's Statutes.

We now come to the second, and present, era of corporations in this state. The New York constitution of 1846, which removed so many ancient land-marks, abolished the creation of corporations by special act, and our new contitution four years later followed the example. By Article XV all corporations must be formed under general laws to be passed by the legislature. The constitution also limits the existence of all corporations to thirty years except municipal, railroad, plank-road and canal corporations. By recent constitutional amendment extensions of the term may be permitted by the legislature, which has accordingly passed laws allowing for the extension of the life of mining, manufacturing, religious, charitable, educational, mutual-insurance, agricultural and gas-light corporations. No corporation can hold real estate, not actually occupied by it in the exercise of its fran-

chise for a longer period than ten years. But this constitutional provision is not enforced by the state authorities, and is practically a dead letter. Vast amounts of land are held in contravention of this provision. By the constitution rates of railroad corporation charges may be established and this has been done by statute.

General laws to the number of one hundred and fifty-six have been passed from time to time since 1850 for incorporating almost every kind of lawful business and association, and the result has been that we now have in this state about eight thousand corporations which are organized under those general laws, divided as follows: Manufacturing and mercantile, twenty-five hundred; mining, thirteen hundred and twenty-eight; railroad, seventy-nine; street railway, one hundred and thirty-two; transportation, one hundred and twenty-three; state banking, one hundred and fifty-nine; charitable two hundred and forty-eight: improvement, seventy-seven; miscellaneous, twenty-eight hundred and eighty-two.

To this great number of domestic corporations must be added one hundred national banking corporations, and a large and not ascertainable number of foreign corporations, that is, of our sister states and other countries, which do business in this state by its express permission, and which the state has power to shut out in its discretion. Our statutes for forty years have declared that such corporations may make contracts here, and protect themselves in our courts, and have put them on the same footing substantially as corporations created under our own laws. In a few cases only, such as those of insurance companies, have any conditions been imposed

Let us now look more closely at our modern method of forming corporations, and we shall see that if their formation was formerly too difficult, it is now too easy.

A paper is prepared called "Articles of Association," setting forth the names of the proposed corporators, commonly from three to seven; the purpose; the amount of the capital stock, which the general law seldom limits; the *par* of shares which the law generally fixes; the amount of capital actually paid, which is usually a very small percentage; the place where the operations are to be carried on, and the term of existence. The paper being signed, acknowledged and filed, there is a full fledged corporation. The signers are not required to be citizens or even residents of

Michigan. The charter of the corporation consists of the general law under which the particular corporation exists, and its articles of association. If the general law is repealed, any power existing under it, which could not be exercised by unincorporated persons, is abrogated; and the property acquired and contract rights belong to the persons who were stockholders.

It cannot escape our attention that these articles of association are substantially *ex parte* and that there is no supervision of any official authority whatever over their formation and execution and proceedings under them. Certain reports are indeed required but of a perfunctory character which afford no real light. The articles are gotten up solely in the interest of private persons who propose to become incorporators and who put into the articles whatever they think may be for their personal advantage, without regard to the public or to creditors or even future stockholders. It thus appears that we have a system under which individuals, by their sole action may assume power is affecting the interest of the community very largely.

We have in Michigan some statutes relative to corporations not generally found in other states, and some of these statutes deserve notice. In the annual election of directors of all corporations under general laws (except municipal) every stockholder may vote his shares for all the candidates, or may give one candidate as many votes as will equal the number of candidates multiplied by the number of the voter's shares; or may distribute his votes on the same principle of cumulation among as many candidates as he may choose. This law is supposed to be for the protection of minorities. A similar provision has found a place in the constitutions of Pennsylvania, Illinois and Missouri, and in the New York Business Corporations Act, of 1875, which authorizes incorporations for any lawful business. I think the provision is not much availed of in practice, and that it furnishes another instance where theory is not realized in practice. Another very important statute is that which invests any corporation formed under any general law (except mining and competing railroad corporations) with power to sell all, or any portion of its property or franchises to any other corporation organized for similar purposes. The plain tendency of this statute is to produce a capitalization according to income rather than assets, to prevent competition, restrain trade, create monopolies, enhance prices and engross the market, and the statute is therefore contrary to public

policy. Under it a single individual or corporation may acquire the property and franchises of all other corporations in the same business in this state. In like manner by statute a railroad corporation, domestic or foreign, may purchase the property and franchises of any other railroad company, not having the same terminal points and not being a competing line. We have also what are called partnership associations, limited, which are in reality corporations, within the definition in our constitution, because they have some of the powers and privileges of corporations, not possessed by individuals or partnerships. One of the most important of the statutes is that which permits incorporation by any three or more persons for any manufacturing or mercantile business. Under this statute retail dry-goods stores and corner groceries are often incorporated. This plainly is against the theory on which any incorporation is permitted, namely that an artificial person should be created only for purposes which natural persons would be unable to accomplish.

We have many municipal corporations. These like all other corporations derive all their powers solely from legislative enactment. They are, in truth, subordinate governmental agencies exercising the most important powers. A commission is now in this state to prepare and report to the legislature a general law under which all such corporations may be placed. Our constitution declares that the legislature shall restrain municipal corporations in respect to the powers of taxation, borrowing money, contracting debts and lending their credit. How salutary this power is, if properly exercised, may be seen from the fact that the revenue raised from taxation in the municipalities of the United States exceeds three hundred millions of dollars, and their aggregate indebtedness (including counties and school districts) reaches nine hundred millions. These amounts much exceed the taxation and indebtedness of the states themselves. Michigan's proportion is relatively as large as her population and wealth. Those who vote these sums are not those who pay them. In Vermont alone of all the states municipal charters limit suffrage to taxpayers, and also limit the rate of taxation and the amount of indebtedness.

A franchise tax of half a mill on each dollar of authorized capital is laid upon both domestic and foreign incorporation. Respecting other taxation of corporations the rule is, here, that corporate property is assessed to the corporation as to a natural

person at the place of its principal office except in the case of those corporations which are subjected to specific taxes. Under the constitution this description of taxes may be collected from banking, railroad and any other corporations at the pleasure of the legislature. They are appropriated to educational and state debt purposes. They are made a lien on all the corporate property and may be laid on the capital stock, on the gross receipts (except from interstate business) by a percentage, or by arbitrary sum on each ton of product of iron, coal and copper corporations. The property of religious and literary corporations actually occupied for corporate purposes is exempted. Much discussion has been had recently adverse to these exemptions but the wisdom of them cannot be doubted. Religion and education are the corner stones of the social edifice. No republic can stand without them. Such corporations in this state are numerous, powerful and useful beyond all calculation. Religious corporations are governed by special statutes adapted to the internal polity of the different denominations. The legal body is distinct from the spiritual body for which it provides. Gifts to such corporations are trusts for what is technically termed charitable uses. I must not omit to say that the state is forbidden by our constitution to become a stockholder in any corporation or to engage in any work of internal improvement.

Having thus given a rapid general sketch of corporations in our state, many pregnant reflections come to us in making our review. It is plain that as to private corporations there is no protection for those who put in capital or those who give credit. Neither the investor nor the creditor is adequately considered. We have departed very far from the fundamental policy declared by Adam Smith and other political economists, that corporate privileges should be granted only for enterprises of great and general public utility demanding extraordinary capital and for purposes which unincorporated persons cannot effect. Liability of associates extends only to labor debts and not to the amount of their investment. No tribunal passes on the necessity or propriety of a proposed corporation, even when it may exercise the power of taking private property and may propose to parallel an existing railroad. There is no restriction against a corporation obtaining credit beyond its actual resources, nor against issuing stock (except in case of railroad stock) and mortgage-bonds without any real consideration, and without assets. There are no conditions as to *bona*

fide capital, good faith, and above all, *publicity*, which should beat with fierce light upon all privileges emanating from the public, and denied to all unincorporated citizens. Stockholders and creditors alike suffer so much from the absence of any proper supervision and control of corporations by this state that there is much reason for the popular prejudice against them shown by the verdicts of juries. This antagonism should find its proper field in promoting such legislation as I indicate further on.

We notice in Michigan as in the other states, the remarkable fact that this state which creates our corporations is not allowed to determine their rights and duties in her own courts because the federal courts have usurped jurisdiction over Michigan corporations in all controversies with citizens or corporations of other states, on the ground that a Michigan corporation is conclusively presumed to be composed of Michigan citizens although (as stated above) corporators need neither be citizens nor residents. Congress should interfere and restore to the states their rightful jurisdiction.

In view of what has been said above I make some practical suggestions as to further legislation in this state.

1. There should be a board of control of corporations consisting of the secretary of state attorney general and state treasurer, and no private business corporation should be allowed to be organized or to do business without the approval of this board upon published notice and opportunity to be heard by any citizen. Such a board with such powers exists in France, and its working is admirable. And no foreign corporation should be permitted to do business here without filing a copy of its articles and obtaining leave from the board, and it should then be made subject to all the restrictions and limitations imposed on domestic corporations of its kind.

2. Either corporate powers should not exist until the full amount of the proposed capital is paid or secured, which is the law of Massachusetts, or else the stockholders should be made liable up to the amount oi their stock for all corporate debts. This is the federal statute with regard to investments in vessels, being a limitation of the former liability of shipowners as partners. In the states of New York and Rhode Island all stockholders of a manufacturing corporation are liable as partners for its debts until the capital has all been paid in and evidence of that fact been placed in the public records. The theory of exemption

from liability is, that the exemption is off-set, as respects the creditors, by a large paid-up capital, and publicity of proceedings, which, together, protect him. But in Michigan the creditor has the burden of the exemption without the benefit of the off-set. No transfer of unpaid stock should be permitted.

3. All corporate books and records should be open to the inspection of stockholders and creditors and the board of control, at all times, and no mortgage or floating debt should be allowed beyond half the value of the assets, and the sanction of the board of coutrol should be required to any mortgage.

4. All mortgage bondholders, who in practice generally furnish the capital, should be treated as preferred stockholders and entitled to vote, the same as common stockholders, for the board of directors and in all other matters. As the law now stands in Michigan, a set of unscrupulous and impecunious stockholders can destroy all the corporate property, which equitably belongs to the debt-holders; and this is not an infrequent occurrence.

5. Stock and bond issues should be restricted by law to actual expenditures. This would soon allay the speculation which afflicts us.

6. Persons engaged in ordinary business, like dry goods dealers and grocers, should not be allowed to incorporate, or have any special privileges, not possessed by unincorporated persons. Public policy permits the creation of corporations only for purposes which natural persons would be unable to effect. Besides, public policy requires that the good will, personal liking, confidence and identity of interest, which exist between individual masters and servants, should not be impaired by the substitution of a corporate master.

In considering the above suggestions, however, we must inquire whether or not they tend to limit, undesirably, freedom of contract.

In closing I observe that we witness in Michigan the same phenomena which are noticeable elsewhere with regard to manufacturing corporations. The economy of production on a large scale has led to the use of corporations in these enterprises in this state very generally, and necessarily those who do the work are the servants of those who provide the work to be done. The interests of these two sets of people are in reality identical but the servants can never be made to see this. Can there be any union of the two sets by the servants being allowed a share in the enter-

prise? Statutes can neither forbid nor foster this. The history of legislation shows this to be a matter above and beyond statutes. Sporadic instances of profit-sharing exist as exceptions to the general rule that it is not practicable, and the exceptions seem to prove the rule.

In Michigan we have been measurably exempt from combinations of corporations in the form of trusts, and combinations of servants of corporations to prevent other laborers from laboring. Both these forms of combination work an insufferable tyranny but one with which our existing laws are adequated to cope if properly enforced. The enormous powers, legislative and judicial, wrapped up in the inter-state commerce clause of the federal constitution, are gradually being unfolded in a legitimate though unforeseen way. The federal government is a part of the government of Michigan, and Michigan will feel the beneficent effects of recent developments of the power of the former in regard to carrying-corporations.

*EMINENT DOMAIN, ITS GROWTH AND LIMITATIONS.**

THOMAS E. BARKWORTH.

Investigating the growth and present condition of the doctrine of eminent domain we are necessarily attracted to the differing conditions existing now from those prevailing at the time of its earlier application in the political system from which we derive our government and laws. The underlying principles of the feudal tenure as well as the analogous principles governing holdings under the civil law furnish abundant basis for the reservation by the monarch of those rights which were incident to a proper government of his kingdom, its defense and the safety and contentment of his people. But the Englishman like the Roman was proud of his independence, vigorously asserted his right of property as absolute and inherent and constantly resented any attempted intrusion by the king upon the rights guaranteed by Magna Charta. We are therefore prepared for this statement by Blackstone: "So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man or set of men to do this without the consent of the owner of the land. In vain it may be urged that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual private right, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by

* A paper read at the recent meeting of the Michigan Political Science Association.

giving him a full indemnification and full equivalent for the injury sustained. The public is now considered an individual, treating with an individual, for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price, and even this is an assertion of power which the legislature indulges with caution, and which nothing but the legislature can perform."

Democracy had then made much progress against the asserted rights of the sovereign in the strife which had been for ages waged between them; but its continued march has since produced a new alignment of forces which in our country has manifested itself in the greatest perfection. No longer does the public contest the right of its own representative to conserve its interests. No longer is there the adverse personal interest of a selfish ruler to extend his power, regardless of the resultant benefit to the public weal. The asserted basis, "The king has the better right," was a challenge to combat in the long struggle for freedom. Now the public danger lies not in the unwarranted exercise of the right, but in the operation of unrestricted and stimulated natural forces by which the industrial processes are removed from governmental control. The people have taken the place of the king. Under the old regime the sovereign had a dual character; first, personal as monarch, and next as the representative and natural protector of the people. To-day no personal rights of the sovereign intervene. The old time contest no longer exists. The force once negative has become positive. Whether we are agreed with the socialistic school of philosophers or not we recognize and approve the modern extension of the right of eminent domain, both because of the greater interests of modern civilization and because the fears of tyrannical usurpation and descent towards absolutism are no longer a menace. It is not now deemed essential to the exercise of this sovereign power that any reserved proprietary interest should support it. The United States government exercises it over lands where no proprietary right ever existed, while in various states as well as within the territories of the United states lands holden by the state in its corporate capacity are condemned and compensation paid therefor the same as to ordinary citizens. This is the natural result of the changed conditions which have extended the power of the dominion by delegation from the state itself, first, to the federal government, second, to municipalities, third, to corporations exercising their franchises in the supposed

interest of the people, and possibly to individuals. The complex and gradually developing system of social demands is almost yearly adding to the numerous industrial channels connected by logic more or less attenuated with the supposed public interest. Railroads, canals, telegraphs, telephones, mines, wharves, ferries, water and gas works, mills, logging booms, have all been made the subjects of the exercise of the right. I have discovered no adjudicated case wherein the right of condemnation has been directly granted to a private individual, but it is difficult to distinguish betwixt natural and artificial persons where the public is interested in the proposed use of the property. True, a corporation derives its franchise and power to act from the government and is to a certain extent within its control in the exercise of its powers, but nothing prevents legislative power from imposing like conditions upon the appropriation of property by a private person under the delegated right of eminent domain. It is also difficult to logically distinguish between the exercise of this power for the building of a mill to supply a community with lumber or grind its grain, and the establishment of a store to furnish supplies, or a manufactory to utilize natural products. It is conceded that the entire public need not be benefited nor those deriving benefit be equally gainers. It is often difficult to discern any substantial benefit other than a private and financial one. This has been notably true of very many drain proceedings instituted under the laws of our own state where the alleged benefit to the public health was so infinitesimal as to be clearly an excuse rather than a reason for the exercise of the power. The distinction is sometimes made between eminent domain and the right to use a citizen's property in time of war, its destruction to prevent hostile forces from enjoying it, to prevent the spread of contagion or fire, and other well recognized rights of interference. But in the cases cited the difference is more in method than in principle. Under these circumstances the necessity is deemed urgent because danger is imminent and precluding the use of legal process, and compensation, if made at all, depends entirely upon the grace of the state. But it is not apparent why the urgency of the necessity should destroy the rights of the citizen which otherwise would be deemed to demand remuneration, especially when we consider that the courts of most of the states hold valid the condemnation and appropriation of property without having previously ascertained or paid the compensation, if the legislature has fur-

nished machinery to subsequently appraise and secure it. The principle justifying the exercise of power in either case is the same. In its naked form it may thus be stated: "The public has the better right." Nothing can stay the progress of this proposition in the minds and hearts of of an intelligent world. Timid conservatism and interested selfishness may combine to resist its advance, the anathemas of the church may unite with the fulminations of aristocratic tribunals the world over, but futile is the effort to turn the tide. Students of sociology, political philosophers and Christian propogandists have here a pressing problem worthy of their best endeavor. How can justice be attained and the force coutrolled? If the law administered under constitutions fully recognizing and protecting individual ownership has come so nearly to the line of confiscation as in the cases cited, if the legislative discretion as to public use has so far been extended as almost to destroy the line of demarcation where the socialistic principle has scarcely been promulgated, how portentous are the possibilities in view of the prevalent dissemination of the popular philosophy of equal rights. For it must be remembered that all the limitations upon the exercise of this power are political rather than ethical.

The exercise of the sovereign power of appropriation does not necessarily involve the right of compensation. It is true that the constitutions of all civilized countries recognize individual ownership of property and provide for compensation, but this rests upon an idea of justice deferring to the custom of ages rather than based upon principles of natural equity, and in at least one of the American states such necessity is already denied by the courts. The extension of the right of condemnation to municipalities and corporations would, however, seem to furnish a reason conclusive to the political sentiment of the world why the element of compensation should accompany the exercise of the right so long as the present social and industrial systems remain, but politically there is no limit other than the slow movement of popular sentiment and the natural reverence for institutions of long standing.

Constitutions are not a defense against the torrent of awakened intelligence which is being loosed by the logic of rapidly changing industrial and social conditions. Already it realizes its gathering power and only awaits the crystallization which time will surely bring. Its weapon is the monarch's reservation, the

right of eminent domain. Already in lands less democratic than our own its energies, more forward because of greater incentives have compelled concessions we yet withhold. Shall we not rather control than combat the rising force? Ethical considerations can now be urged and a righteous result may yet be reached. But in the heat of contest the logic of morals has but little weight against the logic of power. It is apparent that we have but dammed the stream and woe betide us if we leave our land to meet the remorseless flood of its pent up energies. The abstract question, "What limitations are proper from the standpoint of political science," would be variously answered. Doubtless the nationalists would say, "Destroy all limitations," while the advocate of absolute ownership by the individual and the doctrine of laissez faire is already fretting at the unwarranted abuse of the power on what seems to him frivolous pretexts. But the student of political science realizes the impracticability of the one and the glaring selfishness of the other. Feeling the pressure of our increasing public burden and of problems becoming more and more perplexing every day he looks to the machinery at his command and if by any chance he can promote its efficiency and accomplish a result beneficial to the people, keeping meanwhile in view the ultimate effect of the change, he is not troubled if he fails to please either the elevated seer of visions or the mourner groveling in the dust of history.

The century and more of our national history has disclosed the wonderful flexibility of our institutions and if care is exercised but little danger of serious conflict exists. Gradual extensions of this important power may be looked for as the growing influence of monopolistic combinations make some countermovement inevitable. The line and method of these extensions does not yet plainly appear, but inasmuch as no serious obstacle lies in the way of radical change it may be assumed that some well defined advance will soon blaze the way.

If the method of compensation can be changed so as to provide for an annual interest charge upon the value of the property condemned instead of the immediate payment of its value, the way would be much easier. This proposition has in it nothing that smacks of confiscation and is in direct conformity to the right to control rates and thus affect profits asserted by legislatures and approved by the courts without question where no conflicting contract relation exists. I am not certain that any

change of constitutional provisions would be necessary to the assertion of this right by legislation. The money question would be much nearer solution if the supply of the precious metals was under the direct control of the nation. The large proportion of the world's supply which our own republic may be expected to produce would under such control give us a leverage in the international discussion of the subject which, it seems to me, would insure a satisfactory adjustment. The mines, as well as the means of transportation and communication in which the public is so largely interested are largely under the control of corporations which have been aided to their present position of oppressive monopolies by the delegated power of eminent domain. But even the franchises of these corporate bodies are subject to the exercise of this right at the hands of the government itself. Whether the original policy of delegation was wise or foolish the people can easily reassert their sovereignty over the temporary possessor of a portion of their inherent power. And it seems to me that circumstances justifying further delegation to private enterprises would rarely present themselves. Usually valuable franchises accompany the grant of the right and private corporations are everywhere found in possession of strategic if not legal monoplies resting upou an indirect appropriation of the benefits first secured by the state by virtue of this principle. Witness the hundreds of millions of dollars of street railway, telegraph and telephone stock. No objection other than the one based upon the incompetency of the administrative system to properly manage large business enterprises can be justly urged unless indeed one insists that the theory of individualism runs counter to any interference by the government with the industries of the nation. But this point has long been passed by social progress. To-day not only does the government school our children, carry our letters, maintain lighthouses, dredge rivers, dig and maintain canals, educate doctors, lawyers, dentists, engineers, farmers, chemists and mechanics, all in a manner comparing favorably with the successful efforts of like character by private enterprise, to say nothing of the moiety of private failures, but it also treats our sick and insane, alleviates the sufferings of the afflicted and undertakes in whole or part the care and support of a large dependent class significantly named defectives. What a sociological absurdity this last proposition presents. The structure of individualism will not tolerate the interference of the community with its scientific pro-

cesses until their logical results have compelled the attention of humanity and Christianity, when the public, without any disturbance of the equilibrium of the system, assumes the burden of its defects. My subject suggests a reversal of this process. Let the governmental control be exercised at the other end of the structure. Then let our legislatures and courts be but half as astute in discovering the connection between the public interests and the channels of corporate effort as they have been in the granting of franchises and the troublesome question of corporate intrusion will be more than half settled. And whatever may be thought of the practicability of this suggestion, certain it is that no other feasible plan of restraining the aggressions of these apparently necessary aggregations of effort has yet been presented. States and nations stand aghast, yet inert, contemplating the ever narrowing domain of personal opportunity, and the barren abstraction of equal rights before the law. Plainly some drastic remedy must be applied, and to my mind no method promises better results than the gradual assertion of the right of the public to itself control those lines of effort in which large combinations of force are essential to success and which are connected more or less intimately with the interests common to all.

Jackson, Mich.

NOTES.

FRAUDULENT ADMISSION TO THE BAR AT ANN ARBOR.—Dean Knowlton and Prof. B. M. Thompson, of the University of Michigan, Law School, merit liberal commendation for their action in the matter of the admission to the bar of one Alfred P. Barton, who is alleged to have obtained admission through misrepresentation and fraudulent proceedings. Barton was admitted to the bar on April 21, 1894; his certificate of good moral character having been signed by an ex-prosecuting attorney of Washtenaw county. On April 25, Dean Knowton and Prof. Thompson filed a petition asking that the order of admission be rescinded and Barton's name stricken from the rolls, on the ground that the order, and the ex-prosecuting attorney's certificate were obtained by the "fraud and deceit of said Barton." The petition further charges that Barton went to Ann Arbor two years ago, having been sent there by his mother and kept there at her expense for the purpose of entering the law department. He never connected himself with the university, however, and during his entire residence, the petition alleges, "he has used intoxicating liquors to excess and has been a gambler and a corruptor of youth." If the allegations of the petition can be sustained by evidence, and we have no reason from the standing of the petitioners to believe otherwise, the circuit court of Washtenaw county should make an example of the young man. If our judgment of Judge Kinne is not greatly at fault, this opportunity to emphasize the necessity of surrounding admission to the bar with greater safeguards will not be lost. Professors Knowlton and Thompson deserve the praise of the bar of Michigan for their prompt action in the case. There should be more lawyers like them in our larger cities.

DAVID DUDLEY FIELD.—David Dudley Field, who died on the 14th of April, was one of the most remarkable men of his time. He belonged to a remarkable family. His father, a congregational clergyman, came from Hallam, England, and on an income of $500 per year gave every one of his four sons a complete classical, as well as practical, education. One of the sons, Cyrus W. Field, laid the Atlantic cable. Stephen J. Field is at present on the bench of the Supreme Court of the United States. Henry W. Field is editor of the *New York Evangelist*. Eminent and successful as these three brothers have been, none of them have accomplished more than the eldest, whose earnest, patient, success-

ful toil in the line of law reform has earned for him a place in judicial history more enduring than any monument of brass or stone. David Dudley Field was one of the kindest of men, and one of the most considerate. The LAW JOURNAL has in its possession a whole case of letters written in his own clear hand urging the advantages of codified laws. "No other ambition have I," said he, "than to see my codes adopted;" and again, "law reform is as necessary as ethical or moral reform." Born when our republic was yet young, nearly 90 years ago, this great lawyer saw our laws and institutions develop. He studied these laws, and the growth of these institutions as a science, and therefore we do not wonder that he spent a great portion of his phenomenal energy striving to purge his country's laws of their useless technicalities and inconsistencies. Hon. Alfred Russell, who knew him intimately, says he was one of the greatest lawyers of any age, and America can proudly hold his name, and the name of his family of mental giants *in memoriam*.

The great age which Mr. Field attained, though seemingly overwhelmed with business to the last, illustrates a strange fact, viz: that the members of the legal profession live longer on the average than the members of any other trade or profession. The Detroit bar has several octogenarians, still engaged in active and successful practice. Among these may be mentioned Samuel T. Douglass, James F. Joy, Geo. H. Lothrop, and C. I. Walker. There is probably no American lawyer whose name is held in greater reverence and respect by the lawyers of the country than David Dudley Field.

"WHAT GOOD HAVE I GOTTEN OUT OF IT?"—A prominent member of the bar of Western Michigan, who has been a member of the Michigan State Bar Association since its organization, was heard to remark recently, just after paying the annual dues of the bar association for 1893 (which, by the way, were nine months in arrears): "I've paid $6.00 into the association. What good have I gotten out of it?" The attorney who uttered this query was too good a lawyer and too prominent a member of the bar to question the necessity for the existence of the association. The query and the tone in which it was expressed, however, convey the impression that he believes there is no excuse for the existence of the Michigan State Bar Association because it did not do its members, and himself among the rest, any apparent good. If such a spirit prevails generally among the legal profession, or to any great extent among the members of the association, it will be a difficult matter indeed to keep up the association or to make it a power for good. If we cannot look to the abler and more prominent members of the bar for that unselfish spirit which must be depended upon to make the association an effective power for legal reform, it will be only a question of time when the state bar asso-

ciation will be used as an agency for anything but reform. It is undoubtedly true that the membership of the association, as at present constituted, includes the ablest and most progressive attorneys in the state. There are, fortunately, but few curbstone lawyers upon its roll. If the association has no mission in this state, the leaders of the bar would not retain their connection with it. But it has a mission, and it is a duty which every true attorney owes to the profession to join the association and aid in the work which its officers and committees have planned. It is not a question of how much good the individual members get out of the association, but how much good they can do their fellow lawyers, their profession, and especially the public. It used to be that the lawyers were looked upon as the conservators of the rights of the people. It seems to be the modern idea that the lawyers are a class privileged to prey upon the public and to advance their own selfish interests at the expense of the people. Bar associations are or should be organized for the purpose of correcting the modern idea, and every lawyer who stops to inquire what benefit he is reaping from a bar association convicts himself of selfishness. The inquiry should not be, "what good do I get out of this association?" but "what good can I do the profession, and how can I aid the association in its work?"

THE STATE BAR ASSOCIATION DIRECTORS' MEETING.—The board of directors of the Michigan State Bar Association met at Lansing, on Tuesday, April 24, President George H. Durand, of Flint, presiding.

By the constitution it is provided that the annual meeting shall take place in Lansing on the first day of the June term of the supreme court unless otherwise ordered by the board of directors. The first question that was considered was as to whether a better time or place could be fixed upon in order to secure a large attendance. It was suggested that a two days' midsummer meeting at one of the northern resorts would be appreciated by the bar, but after careful discussion it was decided that the time fixed by the constitution—all things being considered—was the best. Certainly one of the things hoped for is that the time will soon come when the members of the bar will have interest enough in the work of the association to warrant the directors in selecting a place for the meeting remote from the courts, and at a time when the members can give themselves wholly to the careful discussion of matters of interest to the bar and also enjoy the pleasures of the vacation season.

President Durand announced that it would be impossible for him to attend the meeting, as his engagements as counsel in the cases of fraud against the United States government would prevent. Judge Champlin was unanimously chosen to preside. There will be three sessions of the association, in the afternoon

and evening of June 5, and the forenoon of June 6. The first session will be taken up by the reading of the president's annual address, the report of the standing committees, and the reading of one or more papers. The committee on "reform in legal procedure" will report. This committee is composed of five of our most prominent lawyers, and it doubtless will be of a most important nature. Ample opportunity will be given for the general discussion of the report. If the report should be adopted with substantial unanimity, a committee will be appointed for the purpose of seeing that it is properly presented before the legislature next winter. The evening session will be given up to an address by some distinguished member of the profession, whose name will be hereafter announced. The session will continue on the following morning, at which time more papers will be read and officers chosen for the ensuing year.

Mr. Fred A. Maynard announced that at the annual meeting he would propose an amendment to the constitution, changing the number of directors from three to twelve, one for each congressional district, with the view of making the board of directors as broad as the state itself.

The supreme court will adjourn, and its members have promised to attend all the sessions of the association. It is also believed that the circuit judges throughout the state will adjourn their courts, if necessary, and that a great majority of them will be present to attend the meetings of the association, and also a meeting of the "Association of Judges of Michigan," which will probably be held at about the same time.

The practical question which is presented to every lawyer of the state is this: Is there a present necessity for the reform of our legal procedure, to the end that justice may thereby be better promoted? If this question is answered in the affirmative, as it must be, then it is high time that the members of the profession charged with the responsibility should cheerfully accept it, and as soon as possible agree upon some measure in this direction.

Ralph Stone, of Grand Rapids, resigned as secretary of the association, and Eli R. Sutton, assistant city attorney of Detroit, was appointed in his stead.

THE DONALDSON CASE.—The following communication from a leading member of the Kent County bar is cheerfully published, as evidence that the bar is not entirely indifferent to its duty in the matter of the professional misconduct of one of its members:

To the Editors of The Michigan Law Journal:

In the April number of the LAW JOURNAL are found two criticisms of the bar of Kent County, neither of which is altogether just.

First, it is stated to be the duty of the bar of Kent County to disbar Frank Donaldson, who has been found guilty of defraud-

ing a client, and is now undergoing imprisonment in the county jail, as a punishment for his offense. That he should be disbarred, no one can deny. That failure to act promptly in such cases casts odium upon the profession, is true beyond question. But is it true that the responsibility for failure to act in such cases, rests chiefly upon members of the bar? Those who remember the history of the notorious McCarthy case, will hardly answer this question in the affirmative. Let us recall some of its leading features. This man, after having been several times convicted of crime (in two cases upon his plea of guilty to the charge of petty larceny), was disbarred by the supreme court as the result of proceedings instituted and carried on by the Bar Association of Grand Rapids. A few years having elapsed, he applied to the supreme court for reinstatement, claiming that he had reformed, and the court made an order permitting him to apply to the circuit court for Kent County for readmission. At a considerable cost in money and labor, certain members of the Kent County bar collected evidence which showed that McCarthy's conduct after his disbarment was no better than it had been before that event, and his application was therefore denied. The action of the supreme court insofar encouraging the application of McCarthy for readmission, as to permit him by express order to apply to the circuit court, was regarded by many members of the bar with deep regret. The efforts of the bar to maintain a proper standard of conduct and character for its members must be unavailing unless sustained by the courts. Not the bar but the courts decide who shall be admitted to the ranks of the profession, and who shall be excluded for misconduct. If the standard for membership in the bar of Michigan is such as is indicated by the order of the supreme court upon the application of McCarthy for readmission, of what use is it to disbar Donaldson? He will soon be permitted to apply again for admission, and with less diligence or less success in searching for proofs of misconduct subsequent to his disbarment, the bar would be unable to prevent his readmission.

Your item concerning the "Itinerant Justice" contains a mistake in its most material part. The petition of the justice in question was not a petition for his admission to the bar *without examination*, but was a petition that he be examined for admission.

Yours,

L. W. WOLCOTT.

Mr. Wolcott, in the case of Donaldson, says, in effect, that the offending attorney should in reality be disbarred, but that it would be useless, for whatever action the bar would take would be liable to nullification by the courts. If this is so, it is lamentable indeed. But we are loath to believe that the supreme or circuit court would interfere, after a properly conducted trial and disbarment by a competent committee of the Grand Rapids Bar Association. Even if there is a probability of such interference

and practical nullification by the courts, has the Grand Rapids bar performed it duty by neglecting to institute proceedings against the attorney who is already convicted of unprofessional conduct?

It may be interesting to note that since the above communication was received the case of McCarthy has been finally disposed of. Death last week called him to judgment before a higher court.

TAX INHERITANCE LAW, UNCONSTITUTIONAL.—The supreme court of Michigan filed an opinion, by Judge Long, on April 17, 1894, declaring the act of the legislature of 1893, (Act No. 205, Public Acts of 1893), known as the "tax inheritance law," to be unconstitutional and void. The text of the law was copied from other states, and those who copied it failed to adapt it, in all respects, to the constitution of Michigan, a natural result of hasty legislation, and one of the penalties of grange politics.

The title of the case, which was really brought to test the constitutionality of the law, is Frederick, Charles and Mary Schenck, Executors of Mary Guess, deceased, vs. Edgar O. Durfee, Judge of Probate. The sections of the act discussed by the court are Sections 14 and 20. Section twenty provides: "All taxes levied and collected under this act shall be paid into the treasury of the state for the use of the state, and shall be applicable to the expenses of the state government and to such other purposes as the legislature shall by law direct." The court says, in substance that the law is void because being a specific tax, it contravenes sections one and fourteen, article fourteen, in the state constitution, in that it does not provide for the payment of the tax into the primary school, university, and other educational funds, nor for the application of the tax upon the interest and principal of the state debt, but that under the provisions of the act the tax is to be paid into the general fund of the state and applicable to the general purposes described in section twenty of the act. As it is a specific tax, the court holds that it must be applied as the constitution provides, and since it is not applied as the constitution provides it is unconstitutional and void.

If it is a tax upon property and not upon transfers, as the relator contended, the act violates section eleven article fourteen of the constitution, which provides that "The legislature shall provide a uniform rule of taxation, except on property paying specific taxes." The rule is unquestionably not uniform, as it provides (section one) for a tax upon transfers of property of $500 or over at the rate of five per cent of the market value; and again (section two) it provides that transfers to certain classes, next of kin, etc., shall not be subject to the tax unless the transfers are of the value of five thousand dollars or more, in which case the tax is at the rate of one per cent of the market value. This is not

uniform taxation. So even were it not a specific tax it would be unconstitutional and void because it is not uniform.

The court concludes its opinion as follows: "The legislature has attempted by section twenty of the act to apply the money arising from the tax to the expenses of the state government, and to such other purposes as the legislature might direct. These provisions of the constitution as to the application of the funds arising from specific taxes are mandatory. and the legislature has no power to place the moneys arising from such taxes into another fund than those designated.[1]

The moneys, therefore, arising from this tax, if it be regarded as a specific tax, must go into a different fund by this constitutional provision than that designated by the legislature under section twenty of the act. The only question then is whether treating this part of the act void, can the remainder of it be held valid? It is a well settled rule in this state that a statute unconstitutional in part may be valid as to the remaining provisions.[2] If, however, the constitutional provisions of the act are not capable of accomplishing the object of the statute the whole statute must fail.[3]

"Our constitution, as is seen provides that every law which imposes a tax must state the object to which it is to be applied. In this law the object was stated, and it is found that within the express terms of the constitution, the moneys arising from it cannot be so applied. This must defeat the whole act, for it is impossible for this court to say that any part of the act would have met the approval of the legislature had the moneys arising from the tax been appropriated, in the act, as provided by the constitution. It is safe to say that if the legislature had supposed these moneys arising from the tax could not be appropriated to the general expense fund and made applicable to the state government, the act would not have met with the legislators' approval. For these reasons we think the whole act must be held void."

RIGHTS OF CHILDREN ADOPTED UNDER A LAW SUBSEQENTLY DECLARED UNCONSTITUTIONAL.—The decision of the supreme court of this state in *Wright v. Wright*[4] bearing upon this question, will be read with more than usual interest; not only because it is an interesting exposition of the law upon the point involved, but because it clearly reveals the tendency of the court in cases where the principles of law and equity conflict. A bill was filed by collateral heirs of Phineas Wright, deceased, to restrain defendant, who claimed to be the son of the deceased by

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1 *Wolcott v. People*, 17 Mich., 68; *Youngblood v. Sexton*, 32 Mich., 406.

2 *Ames v. Port Huron, etc., Co.*, 6 Mich., 266.

3 *Feck v. Township Board*, 82 Mich.' 393; *Smith v. Saginaw*, 81 Mich., 123.

4 58 N. W. Rep., 54, (Feb. 27).

adoption, from committing waste on land of which said deceased died siezed, and which the complainants claimed as heirs at law. The defendant, on the other hand, claimed that he had inherited the property as adopted son. It appeared from the evidence that when defendant was less than two years of age he was taken into the family of deceased by indenture, entered into with the county superintendent of the poor, binding him to the deceased until he became twenty-one years of age. Subsequently, when defendant was about eight years of age, he was duly adopted by deceased and his wife, in accordance with the laws then in force. He remained with deceased continually thereafter until the death of the latter, which occurred when defendant was upwards of twenty-two years of age. During all the intervening years he had acted and been treated as a son and, as a matter of fact, did not know until after the death of the deceased that he was not his child by birth. After the death of deceased, proceedings were taken to determine his heirs, as provided by statute, and upon the hearing in probate court defendant was so adjudged. An appeal was taken to the circuit court, in which the proceedings of the probate court were reversed, and the complainants in the present case adjudged to be the heirs at law. The decree to enjoin waste, etc., was granted in the circuit court, from which decree defendant appealed to the supreme court. Previous to the adjudication in the circuit court the law under which defendant had been adopted was, in another case,[2] declared unconstitutional, and therefore void. There was evidence to show, however, that the defendant had been a faithful son to his adopted parents, and that it was the intention of the deceased that the defendant should ultimately come into the possession of his property, and that he died in the belief that the defendant would inherit the property as a son. Defendant claimed, therefore, that despite the failure of the law what he claimed to be his rights should be secured to him in equity, and that the understanding, which all parties had lived up to, whereby he had rendered his services, and given his love and affection as a son, with the expectation that he was to receive the property of his supposed father at his death, as a reward therefor, constitued a valid contract which equity should enforce. The court were nearly evenly divided in their opinions. The majority opinion, rendered by Justice Long, and concurred in by Chief Justice McGrath, sustained the claim of the defendant that a binding contract had been created, by reason of which the title to the estate vested in the defendant at the death of the deceased the same as if he had been a son. In a separate opinion Justice Grant concurred in the result, not alone because of the existence of a promise, but as "a case where . . . equity should declare that to be done which the parties clearly intended." Justices Hooker and Montgomery dissented in a strong opinion written by the former.

[2]People v. Congdon, 77 Mich., 357, (43 N. W. Rep., 986.)

While the equities in the case may seem to be in accordance with the majority opinions, nevertheless it must be admitted that the minority opinion, viewed in the light of strict principles of law, is the more tenable. The law under which the adoption was made was subsequently held void. While this may have worked a hardship upon the innocent it was a risk which all persons who relied upon its provisions before it had been tested voluntarily took. There was no express contract between defendant and deceased. Under the indenture by which he was first bound to the deceased there was no express or implied promise to give more than a home, education, etc., until he reached his majority. The adoption proceedings being void, he was not an heir by adoption. By the first adjudication in the circuit court, from which no appeal was taken, it was determined that he was not an heir at law. That the arrangements for adoption and the subsequent acts of the parties constituted what might in any sense be construed as a contract only two of the court seem to be certain. Granting that it could be so held, such a contract would clearly not be one which could be enforced in law. As stated in the dissenting opinion, "were this an express and unqualified agreement to make him such heir, and were it based on the promise of service to which the intestate was not already entitled, it could not be enforced as a contract whereby the intestate had promised to give to the defendant his property in consideration of his rendering certain services." It would seem that the theory upon which the majority opinion was really based is that expressed in the concurring majority opinion, viz: that each party having acted in the undoubted belief that the defendant, upon the death of deceased, would come into possession of the property, equity can give validity to such intentions even in the absence of an express contract. It may be that in this case the equities are with the defendant, and that justice and equity would seem to support the true theory of the majority decision. By its application the rigors of the law have no doubt been oftentimes avoided. While this may be a commendable principle, and one which in its application would as a rule bring about the best results, yet it is not infallible, and not incapable of being too universally applied. If the seeming equities of each individual case are to govern absolutely, the value of a decided case will be reduced to a mediocrity, and the reports considered of comparatively little importance. Attorneys will be entirely "at sea" as how to advise clients; for in few if any cases are the facts and conditions exactly alike, and seldom any precedent will they be able to find upon which they can with any certainty rely. The hope for success will lie in the ability of the counsel, in each particular case, to convince the court that the equities of that case are with him.

MONTHLY DIGEST OF MICHIGAN DECISIONS.

ACCORD AND SATISFACTION—When part payment not deemed consideration.—In a claim when the amount is certain and undisputed, the fact that plaintiff accepted a part payment is no consideration for his wholly discharging the debtor from liability. Leeson v. Anderson. Montgomery, J.

ADOPTION—When right to inheritence not affected by subsequent declaring of adoption law void.—One who has been legally adopted, in accordance with the law in force at the time of the adoption, and has been brought up as a son of his adopted parent, and worked for him without pay until his 22d year, is entitled to inherit the property of the adopted parent, upon his decease, though the law under which the adoption was made has in the meantime been decided unconstitutional, when it is shown to have been the intention of the parties seeking to adopt him to make him their heir-at-law. Wright v. Wright. Long, J. (Hooker and Montgomery, JJ. dissenting.)

ASSUMPSIT—Account rendered—Contract to furnish beer—When objection to charge in acount to be made.—In an accounting where a brewery agrees to furnish defendants beer at the same price per barrel as other breweries, and said brewery makes a charge of $7 per barrel in defendant's pass book, while other breweries charge but $6, the fact that defendants did not object to the extra charge until time of settlement, does not bind them to pay $7 per barrel. Kusterer Brewing Co. v. Friar. Long, J.

BILLS AND NOTES—Accommodation indorser—Payment to agent | Rights of assignees.—A person making a collection on a note for an accommodation indorser with the understanding that the funds are to be applied to his account, but who has given a receipt to the maker releasing him from liability upon the indorsed note, cannot retain the money so collected, as against an assignee of the note who has purchased it in good faith. McLellan v. Welsh. Long, J.

CARRIERS—Injuries while alighting from street car—Negligence—Evidence.—It is competent to show physical condition of plaintiff and his ability to earn a living previous to accident for which action is brought. In proving a driver's negligence in suddenly starting a street car from which plaintiff was alighting, a remark by the driver that the car was behind time is not competent as *res gestae* to explain the driver's state of mind. Gardner v. Detroit St. Ry. Co. Long, J.

CONTRACT—Construction of terms.—The term "purchase scale" in a logging contract is clearly construable to mean scale made at the time of purchase, and should be so construed by the court, and not left to the jury. Hayes v. Cummings. Grant, J.

CONTRACT—Machine contract—Optional sale.—A purchaser of a machine with option of return if not satisfactory must do so within a resonable time, and a failure to do so, and refusal or neglect to grant persistent requests for settlement or return of machine, will operate as a waiver of right to return. Forsaith Machine Co. v. Mengel. Montgomery, J.

COSTS—Interest, when begins to run.—A judgment for costs bears interest from time of judgment, not merely from date of taxation of costs. Hayden v. Hefferon. Hooker, J.

COUNTY TREASURER.—A county treasurer cannot collect fees for performing duties prescribed by the law of 1893, passed during his term. Backus v. Carleton. McGrath, J.

COUNTIES—Liability for unhealthy jail.—No action lies against a county for injuries to health caused by confinement to the county jail, which was in an unhealthy condition. Webster v. Hillsdale Co., Grant, J.

CRIMINAL LAW—Irregularity in sentence.—The imposing of a shorter sentence than that provided by statute, being an error in favor of respondent, is not an irregularity of which he can take advantage. People v. Burridge. Long, J.

CRIMINAL CONVERSATION—Evidence.—It is the duty of the court to carefully instruct the jury as to the purpose for which certain testimony is admitted, and when this is done the jury must be presumed to have acted in accordance with the instructions. Letters written by plaintiff's wife and received by defendant are competent to show a criminal intimacy between them. Dalton v. Dregge. Grant, J.

CRIMINAL LAW—Burglary—Attempt to commit larceny—Evidence—Evidence of owner of premises that house was closed and subsequently found open and accused within the house is sufficient proof of "breaking" to support the charge of burglary. Evidence showing that accused was found in the house and that certain articles had been collected in a bundle and placed outside and that accused fled on being surprised is sufficient to show intent to commit larceny. People v. Curley. Montgomery, J.

DAMAGES—Deficiency in amount of real estate conveyed.—Under a complaint alleging deficincy in length of lots bought according to plat, if it appear that no fraud was practiced, and that purchaser received all his deed called for, a suit for damage could not be sustained. Merrill v. Newton. Montgomery, J.

DEED—Conveyance reserving life estate—Vested remainder.—A son who has taken a conveyance from his father in which a life estate has been reserved, and has performed all the conditions thereof, takes a vested remainder at the time of the execution of the deed, which right is superior to that of one claiming under a mortgage subsequently executed by the father. Hitchcock v. Simpkins. Hooker, J.

DEEDS—Reformation—Where a deed by mistake describes lands not owned by the grantor reformation will be granted, at the suit of a grantee, though the land has been subsequently conveyed to one who had knowledge of the mistake. Hoyt v. Gooding. McGrath, C. J.

EJECTMENT—Title obtained during suit—Alteration of record by register of deeds.—After recording a deed the register has no authority to correct the record. In action of ejectment a right to the land obtained after commencement of suit by the defendant must be set up by a plea of *puis darein continuance*. Jennings v. Sockham. Montgomery, J.

ELECTIONS—Validity—Returns, when exclusion of, will not vitiate.—When the returns of inspectors of election bear the date on which they were made, it will be presumed that they were prepared "without recess or adjournment" as required by law. If certain illegal returns are excluded and their exclusion does not change the result, the election will not be vitiated. Giddings v. Wells, Treasurer. McGrath, J.

EQUITABLE ASSIGNMENT.—An arrangement by which one of several heirs is to receive the amount due to the widow of a deceased person, as compensation for caring for and supporting her during her life, does not operate as an equitable assignment, as against her creditors. Morse v. Allen's estate. Grant, J.

EVIDENCE.—In an issue as to whether a certain lot, onto which plaintiff moved defendant's house, was the lot designated in the oral contract, the testimony of a third disinterested party, who moved the house under direction of defendant, that defendant designated such lot, and that both complainant and himself acted upon such designation, will justify a in finding for plaintiff. Pearl v. Hall. Grant, J.

HUSBAND AND WIFE—Fraudulent conveyance—Evidence.—Instructiones—Testimony of witnesses as to statements of wife, to whom an alleged fraudulent conveyance has been made by husband, as to the ownership of the property, made at the time of a levy, is admissible, as well as other evidence bearing upon the question of ownership; and the jury should be instructed to consider such evidence, together with the testimony of the husband. Warren v. Carpenter. Montgomery, J.

JURISDICTION—Foreign court—Appearance.—The jurisdiction of a foreign court is complete when a resident of Michigan appears generally in an action; and the entering of an order dismissing this statement of defense does not divest the court of jurisdiction. Ferguson v. Oliver. Montgomery, J.

JUSTICE'S COURT—Jurisdiction—Waiver of defects—Special appeal. —The raising of objection to sufficiency of declaration in a justice court constitutes a general demurrer, which gives the court jurisdiction and operates as a waiver of defects in the return to summons; and the appearance of defendant cannot be defeated by a subsequent attempt to withdraw the appeal. Objections to the holdings of justice as to the sufficiency of declaration cannot be raised by special appeal. Stevens v. Harris. Montgomery, J.

MANDAMUS—When granted by supreme court in first instance.—An order to show cause will be granted by the supreme court in the first instance, without remanding relation to circuit court, when public interests require immediate disposition of the case and forbid delay. Loranger Township Treasurer v. Navarre. Per Curiam.

MANDAMUS, when lies to vacate order—Costs in justices court—Jury fees—Return of justice.—Before mandamus will lie to compel a circuit judge to vacate an order application should be made to him to vacate it. Jury fees are included in the costs required by How. St. § 7003 to be paid to justice of the peace. The return of the justice does not conclude parties from showing that the jury fees have not been paid. Swarthout v. McKnight. Montgomery, J.

MASTER AMD SERVANT—Negligence—Fellow-servants.—A defendant company who has used gangplanks of a particular kind without an accident for 15 years, will not necessarily be deemed guilty of negligence because it has not adopted certain improved methods later used. One who has been engaged on the same run for a year and knew the hazards of the business must be deemed to have assumed the risks thereof. A conductor is a fellow servant of the brakeman. La Pierre v. C. & G. T. Ry. Co. Grant, J.

MUNICIPAL CORPORATIONS—Defective streets—Notice.—To recover for injuries upon defective streets actual or constructive notice must be shown; and where the defect has not existed long enough to constitute constructive notice and no actual notice is shown the court should direct a verdict for defendant. Reed v. City of Detroit. Grant, J. Hembling v. City of Grand Rapids. McGrath. C. J.

NEGLIGENCE—Injuries on railroads—Contributory negligence.—A switchman who voluntarily places himself in a dangerous position and by his inattention is injured is guilty of such contributory negligence that the trial court should direct a verdict for defendant. Farmer v. M. C. R. R. Co. Hooker, J.

NEGLIGENCE—Railroad crossings—Contributary negligence.—Is it contributary negligence to attempt to cross a railroad track, the view of which is obstructed, without stopping to listen for a train, known to be due. Houghton v. C. & G. T. Ry. Co. Hooker, J.

PARTNERSHIP—Liability of retiring partner.—A retiring partner is liable to parties with whom the firm has dealt, when no notice of dissolution has been given, and letter-heads with his name thereon continued to used. Morrill v. Bissell.

REPLEVIN—Return, effect of failure of officer to sign.— Upon failure to sign return to a writ of replevin, the writ should be granted on defendant's special appearance and motion. Sommers v. Hinas. Long. J.

RES JUDICATA—Effect of non-joinder, etc.—An error in failing to join an interested party in a suit will not affect facts litigated and settled on their merits against other parties who were joined. Curtis v. Fowler. Montgomery, J.

SALE—Parol evidence to prove warranty.—Where a sale of goods has been made upon a written contract parole evidence is not admissable to prove a warranty, express or implied. McCray R. & C. S. Co. v. Woods. Hooker, J. (McGrath, C. J. and Long, J., dissenting.)

SALES—Recission—False representations—Parol evidence.—A person giving an order for goods, relying wholly upon the representations of the seller, is entitled to recind if the representations are false; and, though it be expressly stated in the written order that "all claims for verbal agreements not embodied herein are waived", parol evidence is admissible to show that the order was given upon such representations. Peck v. Jenison. Long, J.

SCHOOL DISTRICTS—Contracts—Ratification—Legality of meetings—Burden of proof.—A contract for the purchase of goods by a school district is not valid unless ratified by a meeting of the voters of the district, which must be shown to have been legally called. Central School Supply House v. School District No. 3 of Montague Township. Grant, J.

SERVICE, of order of confirmation, when presumed—Writ of assistance.—In the absence of proof to contrary, service of order of confirmation of mortgage sale on foreclosure, upon which a writ of assistance has been issued, will be presumed to have been legally made. Tucker v. Stone. Long, J.

TAXATION—Tax records—Validity of tax sales.—The items of taxes, interest, collection fees. etc., in a tax record book, must contain some signs or marks indicating what the figures mean, otherwise a tax sale under these records is void. Millard v. Truax. McGrath, C. J.

TRIALS—Instructions by court—New trial—A new trial will be granted when the trial judge in his charge uses language which, though meaningless, materially tends to influence the jury wrongfully. Raymond v. Woolfenden's Estate. Long, J.

TRUSTS—Jurisdiction—Chancery and probate courts.—In a continuing trust, which is the result of a contract between two parties, one of whom is deceased, the proper place for adjusting of the rights of the parties is in a court of chancery and not in the nature of a claim against deceased's estate. Fowle v. Barnes. Long, J.

WILLS—Construction—Power of Sale—Conditions.—A provision in a will, under which a widow is given a life estate in lands, empowering her, should the rents and profits thereof not be sufficient for her support and maintenance, to sell said lands, "under the direction of the judge of probate, etc.," is a limitation on the power to sell, and a sale without the direction of the judge of probate is void. Bates v. Leonard. Montgomery, J.

BOOK REVIEWS.

AMERICAN CONSTITUTIONAL LAW.—By J. L CLARK HARE, LL. D. Boston: Little, Brown & Company.

The supreme court of Minnesota has just decided that a statute authorizing the city of Minneapolis "to license and regulate hackmen, draymen, expressmen and other persons carrying passengers," applies as well to the most modern electrical street car system; although the statute was passed long before Minneapolis had street cars, and before electricity as a propulsive power had been discovered. This principle is by no means new in jurisprudence, as the federal courts have applied the laws of the stage coach to the railway train, and the limits of the constitution have been expanded equally in every direction. While the supreme court laid down, in the Dred Scott case, that the constitution must always be strictly interpreted according to the original extent, without enlarging its scope, nevertheless it has had a growth and development, which none but constitutional lawyers can realize. As an exposition of the evolution and adoption of the constitution, which was intended "to live and take effect in all succession of ages," Prof. Hare's work is pre-eminent. Heretofore the work on constitutional law have been written for the purpose of proving some particular theory of construction. Judge Story's work on the constitution, while it is one of the most luminous and learned legal texts ever published, and behind which no one ever need go for facts of constitutional history, or for statement of fundamental principles, yet it has the flavor of a most eloquent and elaborate brief, advocating the national theory of constitutional interpretation. Pomeroy's "Constitutional Law," and VonHolst's "Constitutional History," go so far in the same direction, that the theory has been called an "Imperial Theory". Alexander H. Steven's "War Between the States", is an equally able exposition of the federal, or "state's rights" theory. Prof. Hare says in his preface: "Jurisprudence is a science which must suffer unless pursued with a single eye to truth. * * * A writer who passes them (the decisions of the courts) in review should therefore give the opinions of the judges, whether conflicting or concurrent, as fully as circumstances will permit, and yet not hesitate to state his own, and the grounds on which they have been founded." Prof. Hare has pursued such a course with fidelity from beginning to end, covering the entire ground with astonishing discrimination and comprehension. Only once has somebody tripped, and that is on page 115 of Vol. 1, where 1788 is stated as the year in which the "Kentucky resolutions" were adopted. By illustration and analogy, drawn from British institutions, the most obscure principles are brought out clearly and istinctly; and as Story's "Constitution" is the best early work, covering as it does the formative, or stage-coach stage, so is Hare's "American Constitutional Law" the best modern authority. Von Holst and the Nationalists argue that sovereignty cannot be divided between states and nation. Prof. Hare replies, as does Judge Cooley, that we *have* divided it. The *fact* is sufficient answer to their argument.

Little, Brown & Company deserve the congratulations of the Ameri-

can bar for maintaining the high standard of their excellent publications. This work is issued in two volumes, uniform with the work of Story, or Cooley's "Constitutional Limitations."

CLARK'S CRIMINAL LAW.—Hand-book of Criminal Law. By WM. L. CLARK, JR., St. Paul: West Publishing Co. One vol., 8 vo., 450 pp., $3 75 delivered.

We had several misgivings when we first picked this book up for examination. It hardly seemed possible that a work of so few pages upon so large a subject could be of any particular value. There are only 377 pages of text, the balance being occupied by table of contents, cases cited and index. These 377 pages contain much more than it would appear at first glance. The text contains only a brief statement of fundamental principles, while nearly if not quite one-third of each page is, on an average, devoted to closely printed notes, in which are cited a large number of very important cases, each illustrating and further explaining the statement in the text to which it is cited. By this plan the bulk of the work is largely decreased and makes it just what it purports to be, viz: a "hand-book" of criminal law. No attempt has been made to make it a work upon criminal procedure, and all reference to that branch of the subject has been omitted. Because of the great variance in statutes only the general statutory crimes are treated to any extent. Kindred crimes are treated together instead of in alphabetical order. These features also tend to reduce the bulk of the work. The arrangement is like that of Professor Norton's work on "Bills and Notes", which admirably adapts it to the needs of the student. While the work was no doubt prepared with reference to the special needs of the student of criminal law, nevertheless as an exhaustive index to the latest and most important decisions upon the subject it will fill an important place in the law office, and be just as satisfactory, in many instances, as a more voluminous work.

BOOKS RECEIVED.

BUSWELL ON PERSONAL INJURIES—A Treatise on the Civil Liability for Personal Injuries arising out of Negligence. By HENRY F. BUSWELL. Boston: Little, Brown & Company. 1 vol., $5.50, net.

SPELLINGS EXTRAORDINARY RELIEF.—A treatise on Inj nction, Habeas Corpus, Mandamus, Quo Waranto, Prohibition and Certiorari. By T. C. SPELLING. Boston: Little, Brown & Company, 2 vols., $11 net.

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THE FUNDAMENTALS OF AMERICAN LIBERTY.

THOMAS M. COOLEY.

If the American citizen of average intelligence were asked to explain for the information of a stranger to our institutions, the foundation principles of American liberty, which he would be supposed fully to understand, it would probably be very soon perceived that, though he may for many years have been assisting as a voter in the administration of the government, he had in fact very little knowledge of its fundamentals, and had but imperfectly perceived the meaning of the acts which he had himself performed. He had assisted in working a complex political machinery whereby, as he understood it, the people rule, but why the machinery is what it is, or whether liberty could result under a system essentially different, he had not troubled himself to inquire. Indeed he had very probably assumed that it could not. Nor should this surprise us. The subject is not very fully or systematically taught in the schools, and the young man, when entering upon his duties as a citizen, is apt to infer that the institutions which give him liberty are in their main features the same under which liberty has been possible in other ages. If he reads of the free cities of ancient times he does not pause on details of government, and perhaps does not take note of the fact that they were so different from anything known to us that a different term was requisite under which to classify them. A small city, released from kingly or aristocratic rule, might have been a pure democracy, the people gathering in mass meeting to make the few laws they needed, to decide upon peace and war, and to try persons accused of heinous offences; thus exercising directly as a body the several functions of government. But to the American system such a democracy is wholly unknown. In township affairs

there may be something having resemblance to it, but the correspondence is never considerable.

Our system of government is in every grade, from highest to lowest, representative. It is so for many reasons, but two of them are perfectly conclusive, and we need not to-day examine further. In a country so extensive and so populous as ours a democracy is impossible. The people cannot, even if they thought that to be a desirable system, govern themselves as a democracy. They cannot gather in mass meetings to make laws, or to administer them, or to punish those who set them at defiance. They cannot do this in the higher grades of government, but in the lower, as those of counties or municipalities, the difficulties are almost equally great. Necessarily the people must choose representatives who for some defined period must act for them, and during that period the great body of the people must submit to be governed by the judgment of those they have selected. But again, this is a system that has been familiar to us from our earliest days; we are born to it, and we know nothing of any other by having participated in it. In colonial days it existed with only such exceptions as were made by royal charters, but these were not in the direction of a democracy. When the states became independent of Great Britain the governments created for them to take the place of those they rejected were representative in form, as were also all the lower grades of government which had before existed and which they continued. The chief function of the citizen with us has always been that of choosing his representatives; and this choice is made under such forms as are prescribed by law for the purpose. There is no such thing as his appearing personally, as citizen merely, to take part in the administration of the government while his representative is still in office, except in the few cases which are specially pointed out by the law, and even then he is to participate, not according to his own pleasure, but in the mode the law has pointed out. We have taken care by our constitutions to provide that there shall be a right to petition, but nowhere have we authorized the citizen as such to instruct or command.

For the purpose of what I have to say further on I must ask you to keep in mind how the powers of sovereignty in this country are, for the purposes of political exercise, apportioned between the nation and the state. We shall soon see that this is of the highest importance as it bears upon the subject immediately

before us. I need not do more than state the familiar fact, that the constitution of the United States was framed for the purpose of establishing a government over all the states, which should possess and exercise certain powers for the benefit of all, employing them for the common protection and general welfare. Before the constitution which they established was adopted the states were severally independent, and possessed the powers of sovereign nations. By creating it they conceded some of the most important of these powers to the general government, defining them carefully, and conferring them in terms which beyond question made the United States a sovereign in respect to them. The powers not thus conceded to the nation remained with the states, which were left in respect to these, sovereign as they had been before. The lower municipalities were dependent upon the states for their existence, and for the powers which they should severally be allowed to exercise. The states gave and took away at pleasure. There was thus a subdivision of power for the purpose of convenient exercise which extended from the nation down to the lowest municipalty, but by far the greatest extent of power in this composite system was in the states. The states were left to prescribe the laws of property, of contract for the most part, of the domestic relations, the laws of charity, for the preservation of the public health, for the regulation of the relations between employer and employed, and so on. The states made the public highways directly or through their subordinate corporations. All these things are familiar to us, and I mention them only because the statement seems a necessary part of any showing of the general subject of illegal and therefore improper demands upon government.

Suppose now in some period of unrest a large number of persons—say, if you please, 10,000, of each state in the Union—should simultaneously gather themselves together in their several states to make some demand for legislative action by government which they thought essential to their well being. What an army would this be in magnitude! An army of men large enough if organized and armed, to march from end to end of America, subjecting to their control every people whose territory they should cross. Suppose these should assume to speak in the name of the people of this country, to demand some desired political action. Let us say for illustration that the demand should be for a law making eight hours a day the limit for a day's labor; that the

minimum of compensation should be two dollars a day; that, when work could not otherwise be obtained by all those desiring it, government should provide the unemployed with labor in improving the roads of the country. Or suppose that they should be impressed with the evils of what are now called option contracts in the stock and grain markets of the world, and should demand that laws be passed making option contracts illegal and punishable as crimes. Suppose they demand all these things in the name of the people and the relief that they require must necessarily be obtained if at all through the enactment of new laws.

The first thing we may properly note may be that when this demand is made in the name of the people of the United States, though it is made by a great army, it is in truth made by a mere fraction of all the people; a fraction that when contrasted with the remainder is wholly insignificant. "We, the people"! and yet the great mass—the vast majority—of the people are not among them. Ten thousand from each state might be called out from a single one of the counties; and the remainder of the people might be attending to their ordinary avocations at home wholly undisturbed by this uprising, and perhaps sympathizing with it but little if at all. How comes it that such a fraction of the people assume to speak in the name of the whole people? They are not chosen as representatives; no machinery known to the law has been brought into activity for the purpose of conferring upon them the liberty of speaking for the rest. They are self-elected representatives, and the right to speak for all rests upon nothing but a baseless claim, an impudent assumption. Nothing is plainer than that they have no legal power whatever. If they propose to make a demand on the government at Washington, they will, when they arrive there, be unable to show that they speak for even one-tenth part of the people of the Union. Their claim must therefore be treated as absurd, because it is wholly unauthenticated and unproved. It is without even a moral force; and in a constitutional point of view it may be passed by with entire disregard, because it is made by those who at the very time are represented in the government by persons chosen pursuant to law, and empowered to express their will and exercise governmental authority for them. These chosen representatives are entitled during their term of office to act according to their own judgments, and not compelled to obey the will—perhaps the varying will—of those who have chosen them. If, therefore, those

who come from one state chance to be from one single representative district, and to constitute a majority of the voting force in that district, they would still have no power whatever to require that their representative should act in accordance with their wishes as then expressed. It would be apparent, therefore, that in thus assuming to speak for the nation at large the whole assembled body would be showing either their ignorance or their entire disregard of the fundamental principles which control the exercise of national sovereignty. The whole people of a state, acting together and acting unanimously, cannot if they would enact and give force to a single one of the laws, because in creating their constitution they have thereby in express terms vested the legislative powers of the state in the two representative bodies constituting together its legislature. There the power must remain so long as the constitution contains that grant. Even the legislature itself, if so disposed, could not give back its authority to the people so as to confer upon them the power to make laws. This is a familiar principle. No doubt the legislature, if it desired in a particular case to obtain the popular sense in respect to any proposed legislative measure, might invite the electors to vote upon it, but when that opinion had been obtained it would have no binding force and the legislature might refuse to be guided by it if in their deliberate judgment it should appear to be unsound or impolitic.

But again, if attention is directed to the relief which these people demand from the national government, we see at once that the subjects do not at all come within the powers that have been granted by the states to the nation. Labor contracts are not made under laws which congress may make. We look in vain through the grant of powers made to congress for any grant that would cover them. The highways of the country are not made under national authority, but under state authority. There may be circumstances under which congress may provide for the making of roads, as it did provide at an early day for the making of the Cumberland road, and as it has since provided in some cases for the building of railroads. But in every case some national power has seemed to need the construction of the road for its proper exercise, and the expenditure for the purpose has been placed on that ground. Congress has no power to provide for setting the unemployed at work upon the common roads of the country, no matter how greatly they may need the employment. An anti-op-

tion law would be a law having for its purpose the rendering of contracts illegal though they are made and to be executed locally, and therefore constitute no part of the interstate or foreign commerce which alone congress is empowered to regulate. Thus these demands, important in themselves, it is not within the power of congress to grant, though its members might believe that to legislate as requested would work a great reform. It is the states, not the nation, that must be appealed to upon such subjects. How is it that the mistake is thus made by large bodies of men as regards the constitutional division of power between the states and the nation? An ignorant man has much excuse for it. The nation for vital purposes is above all the states, and holds them in subjection. Its collections and disbursements are so vast, its laws affect all the people in so many different ways, coming down through the taxation of nearly everything we buy and sell so as to affect every one of us minutely in all our business relations, that without stopping to reflect upon the matter we seem to take it for granted that the sovereignty of the nation is unlimited as to subjects, and that it may grant us anything we desire if congress can be brought to consent; a mistake that in the case of great movements like some which have recently been attempted only serves to make them in a legal point of view supremely absurd. The greater the body of men making a demand which it is constitutionally impossible to meet, the more ridiculous the failure when it comes, as come it must.

But suppose now that the demand was for something that was properly within the national authority; suppose it was something in respect to the currency of the country, over the coining and regulation of which congress is given supreme control. If the men who would make the demand will first study the constitution of their country, make themselves familiar with its leading principles, and, above all, with this pervading representative principle, they will soon perceive, if they are disposed to reasonable action, that nothing could be more uncalled for, or more wanting in either legal or moral sanction, than the tramp of a great number of men from their homes to the captital of the nation in order to present their demands to the assembled congress. As already said, the demand is of a sort unknown to our political system. For the time being their political power is in the hands of their representatives. The constitution has carefully saved to them the right of petition, and it is expected that by the exercise of this

right they will present to their representatives the views they may hold on any subject of present importance to them. But the method of doing this in a country like ours is, necessarily, to make use of the representative for the purpose. Petitions may be delivered to him or transmitted to him or to the assembled body through the mails or otherwise, but that is all. The assertion has been made that every citizen has a constitutional right to present his petition in person, but this is a grave mistake. If any such constitutional right existed, it would be within the power of a dissatisfied political party to obstruct at pleasure the legislation of congress, by its members appearing in great numbers for the purpose under the pretense of exercising their constitutional right of petition. But the evil would not stop here. The very presence at the seat of government of vast crowds, to demand of those in authority a change in the laws, would of itself be a menace to stability of government, and no sensible people in framing their constitution of government would invite civil dissensions and attempts at bloody revolutions by giving to such gatherings a constitutional sanction that even in great and dangerous crises would place them above the reach of legislative repression.

These popular demonstrations, though assumed to be made in the name of the people and in the interest of American liberty, are in fact direct attacks upon principles on the continued recognition of which American liberty depends. This is quite as true when the uprising assumes the form of a demand for what is supposed to be requisite to "justice" in the enactment of new laws, as when it has for its object the direct administration of justice through the lynching of those who are accused of offences. A march upon the capital, of great bodies of men with lawless appropriation of the property of others to facilitate the movement, under circumstances which ignore and propose to override the representative principle, is akin to the infliction of vengeance upon an object of popular suspicion or hate: both are anarchistic; and the more they are tolerated the more surely will the doctrine spread, that the laws and institutions which are openly set at naught may quite as well be dispensed with altogether. Anything may be demanded in the name of "justice" to the body demanding it; anything which excites a mob may be punished as a crime. The "respectable citizens" who now and then come forward to justify the lynching of a murderer or ravisher, may themselves be lynched some day because they are better off in

point of property than their neighbors. The number of those in every civilized country, who believe that the accumulation of property by individuals is robbery of the people, is quite sufficient for many lynchings, and the disposition to resort to them may at some times and in some localities not be found wanting. A lynching mob makes its own laws, and may lynch for anything that excites its hatred.

The deductions of reason from what has been said are too plain to be mistaken. Whoever would have from the government that which is politically impossible now, is bound, as a good citizen, to seek it through such a change in existing institutions as will enable his wishes to be met without violating fundamental principles. If what he seeks is possible now, but his methods for attaining it are antagonistic to those which under our system of government are not permissible, he is a foe to regulated liberty though he may assume to speak in its name. And a foe to regulated liberty is a foe to the people who enjoy it, whatever may be his professions. What goes on to-day may be little more than a farce, but those who tolerate and encourage it, for whatsoever reason, until it becomes formidable, should bear in mind, that success achieved in ways which defy the laws is incipient revolution, and may possibly grow in time to proportions that threaten if they do not precipitate civil war.

BURDEN OF PROOF IN ACTIONS FOR BREACH OF CONTRACT OF EMPLOYMENT.*

ALLEN V. WHITLARK.

Michigan Supreme Court, March 27, 1894.

In an action by a wrongfully discharged servant for breach of contract of employment, the burden of proof is upon the master to show what effort has been made by the servant to obtain employment during the remainder of the period for which he was hired.

Error to Washtenaw. (Kinne, J.)

On April 13, 1892, plaintiff and defendant entered into an oral contract, by the terms of which plaintiff agreed to work for defendant upon his farm, doing farm work, for six months, at the rate of twenty-one dollars per month, it being definitely agreed that he was to receive $126 for six months' work. On August 25, a little over four months after the contract was entered into, plaintiff was discharged, the only reason assigned therefor being that defendant did not want him any longer. The counsel for defendant claim in their brief that there was testimony from which the jury might find that the plaintiff was discharged for cause. Neither court seems to have taken that view of the facts, however, but they held instead that he had been wrongfully discharged. Defendant paid him in full for services rendered to the date of his discharge but refused to pay the balance of the contract price. Plaintiff then notified the defendant that he was ready to complete the performance of the contract on his part and that he would hold defendant responsible for the full amount of the contract and for damages. At the expiration of the term of the contract, on Nov. 15, 1892, suit was brought before a justice of the peace, and verdict was rendered, by a jury empanelled, in favor of the plaintiff, for the balance due on the contract. Whereupon judgment was rendered for that amount and costs. The cause was removed to the circuit court by certiorari, the reason

* We had intended to add a note to this case, but a petition for re-hearing having been made, and still pending, comments will be deferred.

assigned therefor being that it was the duty of the plaintiff to show affirmatively whether or not he sought or obtained employment after his discharge, and that there was no evidence in the court below to support the verdict upon which judgment was rendered. The circuit court, after hearing the cause, ordered that judment be rendered in favor of the plaintiff for the sum of six cents nominal damages and costs before the justice of the peace, taxed at eight dollars and five cents, and allowed the defendant the sum of ten dollars costs upon removal to the circuit court. Plaintiff brings error. Reversed.

E. F. Johnson, for appellant.

Thompson, Harriman & Thompson, for appellee.

HOOKER, J. The only question in this case is whether the burden of proof is upon plaintiff or defendant to show what, if any, effort was made by a wrongfully discharged servant to obtain employment during the remainder of the period for which he was hired, in a case where a servant brings an action for breach of contract. The case is ruled by *Farrell v. School District*,[1] which holds that it is upon the defendant. The judgment of the circuit court will be reversed, and that of the justice affirmed with costs of all suits.

LONG, J., did not sit. The other justices concurred.

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[1] 98 Mich., 43; 56 N W., 1053.

PROCEEDINGS OF THE FIFTH ANNUAL MEETING OF THE MICHIGAN STATE BAR ASSOCIATION.*

The fifth annual meeting of the Michigan State Bar Association was held in the senate chamber, Lansing, Tuesday, June 6, 1894. In the absence of President George H. Durand, of Flint, Fred A. Maynard, of Grand Rapids, a member of the board of directors, called the meeting to order and announced that the Hon. M. V. Montgomery, of Lansing, had been selected to preside as chairman of the meeting. Harry D. Jewell, of Grand Rapids, was chosen secretary *pro tem.*[1]

Judge Montgomery, on taking the chair, made the following remarks:

Gentlemen of the Bench and Bar:—In the absence, and because of the absence, of the accomplished jurist and estimable gentleman, who now has the right to preside at this gathering, I was, a few short hours ago, informally requested by those gentlemen who are temporarily in charge of affairs here to be present and to occupy the place which would have been so much adorned by him. I return to you, gentlemen of the Bar Association, my grateful thanks for the kindly compliment implied by this selection. I have not, however, been invited, nor am I expected to do anything else than to occupy this chair, and to perform its perfunctory duties. So, while I feel certain that I voice the universal sentiment of this gathering when I say that we

*The papers omitted from this report will be published in the next issue.

[1] The secretary was unavoidably detained in California and sent a report and letter to the association, but which was not received until after the meeting. A portion of his report is as follows:

"*To the Members of the Michigan State Bar Association:*—At a meeting of the board of directors of this association, held at Lansing, April 24, 1894, I was elected secretary to succeed Ralph Stone, resigned. For such an honor I wish to thank the members of the board of directors, as I am very much interested in work such as this association has in view. Since my election to this office I have been travelling in California, and when I left for the Coast I made every arrangement for returning in time for this meeting, but I have been unable to carry out my plans. * * * The fourth annual meeting of the association was held June 6, 1893, in Lansing. At that time Mr. Ralph Stone read a paper on the "Mission of the State Bar Association," which is a complete history of this association down to the present time. This paper attracted general attention among the associations all over the country, and was favorably commented upon by nearly all the leading legal journals, as well as the daily press. In fact the showing made in Mr. Stone's paper convinced the other

should, one and all, have been very happy indeed to have listened to an address from and by your honored president, I am quite as sure that I equally voice that sentiment (and that there is a great deal of comfort to be derived from the fact) when I congratulate you that inasmuch as we cannot hear him, and listen to his eloquent words, there will be no address from the chair at all.

I might, I suppose, with entire propriety take occasion to say many commendatory things of associations such as this, and of the almost measureless good which has been accomplished in the past by similar organizations. I might, I suppose, with equal propriety in this sympathetic presence dwell briefly upon some of the great number of benefits to society, to humanity, and to the administration of justice, which have been sturdily and steadily battled, contended for, and achieved by the men of our profession almost since the dawn of civilization. But these themes can and they doubtless will be much better, much abler, and much more fittingly discussed by others at the appropriate time, and in their appropriate order. I am, therefore, constrained to announce, without further delay, that I am now ready to hear, and await the pleasure of this convention."

The minutes of the last annual meeting were then approved.

On motion of Mr. Maynard section 1, article IV, of the constitution was amended to read as follows:

"The officers of the association shall be a president, vice-president, secretary, treasurer, and board of directors of fifteen members."

On like motion section 5, article IV, was amended to read as follows:

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associations that the Michigan State Bar Association is one of the most vigorous and active in the land, and as a result, both President Durand, and Secretary Stone, were invited to address the Bar Association of New York, at their annual meeting January last, that report will be found printed in full in the last volume of the MICHIGAN LAW JOURNAL, (Vol. 2, page 240.) * *

The Michigan State Bar Association was organized under an act, approved April 25, 1891, entitled, "An act to authorize the formation of incorporations of associations of members of the Bar." The association, however, was not organized until February, 1890. There has been four annual meetings, but the first three were rather formal, and only routine business was transacted. At the fourth annual meeting an excellent program was delivered, committees were appointed to undertake important work and an effort was made to create an *esprit de corps* among the members of the profession all over the state. A new constitution was also adopted which, it is thought, will enable this association to accomplish more easily its important mission. At the present meeting the association should, in my opinion, appoint committees, (1) to urge upon the next legislature a law which will throw proper safeguards around admission to practice in this state; (2) to pilot bills recommended by this association through the legislature; (3) to further the interests of this association by soliciting new members and stimulating a fraternal feeling in the profession. (4) I would suggest, but the members may not agree in this, that a special committee on law reform be appointed. My reasons for such a committee are found in a paper read before the last annual meeting."

"The board of directors shall consist of the president, vice-president, secretary and twelve other members, elected by the association, one from each congressional district of the state. It shall prepare the program for the annual meeting. It shall have the entire management of the affairs of the association, subject to the constitution and by-laws."

The chair announced that Justice R. M. Montgomery extended a cordial invitation to all members present to enjoy the hospitality of his home in the evening.

The report of the committee on legislation and law reform was then submitteed as follows:

To the Michigan Bar Association:—Your committee on Legislation and Law Reform has not been very diligent during the past year. There are many reasons for this. It is understood that lawyers are busy men, and that most of them have very little time for investigating subjects outside of those in which they are immediately concerned. Aside from this fact, the members of the committee reside—two of them in Detroit, one in Grand Rapids, one in Saginaw, and one in Lansing. The chairman has been unable to get the members of the committee together at any meeting, but in April last he wrote each member a letter calling attention to the fact that they were members of the committee, and suggesting that a meeting ought to be held at an early day to consider and act upon a report, but also suggesting that in case they were unable to attend such a meeting each member submit to the chairman in writing any suggestions he might desire to make for incorporation into the report. Each member of the committe replied to the letter, but none of them, save one, with any suggestions. Mr. Alfred Russell wrote me on the 29th of May, suggesting certain things as proper to go into the report. As there has been no opportunity to secure a meeting of the committee, or any consultation with them to ascertain whether they would agree to the recommendations of Mr. Russell, I have not deemed it best to submit his propositions as coming from the committee, but I beg to submit them for the benefit of the association with the high indorsement of his individual name, and with such comments as occur to me as chairman. Mr. Russell's letter is as follows:

"I suggest that you as chairman of the committee on legislation and law reform prepare a report, embodying among other things—

1. A suggestion that a two-thirds verdict be accepted in civil jury cases.
2. That a department of corporations be established, with power to reject or accept proposed articles, etc.
3. That no files be taken from the office of any court, or examined, except under the eye of a clerk, on payment of a fee of

twenty-five cents. More than three hundred law and one hundred chancery files are missing here (Wayne county), and a large quantity of probate files.

4. That the law on landlord and tenant be revised by a committee appointed for the purpose."

With reference to these suggestions, I take the liberty of saying—

1. I believe the trend of opinion among lawyers is in favor of allowing less than a unanimous verdict in civil cases. I am, however, not in favor of that practice, nor do I believe that it would result in any reform. If there is any serious difficulty in securing honest and intelligent verdicts from juries, it is largely due, in my judgment, to the fact that jurymen do not try the case nor render their verdict in accordance with the law and evidence as given to them in open court, but are governed largely by prejudices and preconceived notions as to what ought to be done in the particular case, independent of the law or the testimony which ought to govern the case. If this be true, then it must frequently happen that the obstinate minority stands as the only defense for some outraged litigant. In other words, is it not more often the case that one, two, or three determined but intelligent jurymen prevent the consummation of some legal outrage on the part of jurors who forget their oaths, and who are ready to give a verdict based upon prejudice, than that they prevent the finding of a just verdict? I should much prefer to have the number of jurymen reduced. I can conceive of no reason why a jury should be any larger than the number which, under Mr. Russell's plan, is to be allowed to control it.

2. I do not know that I am in favor of establishing a new department of corporations. The duty which Mr. Russell suggests should be assigned to such a department is now performed by the secretary of state, and I cannot see why he cannot perform it as well as a new department. There would seem to be no doubt of the power of the secretary of state to reject or accept proposed articles of association. He is required to file them in his office, and this necessarily involves his determination for or against the legality of the articles, or the constitutionality of the act under which the association claims to be organized. If he makes a mistake no serious injury can follow, as the courts are open to correct any mistake the secretary may make.

3. I heartily agree to the third suggestion of Mr. Russell that no files should be taken from any court, or examined, except under the eye of the clerk.

In 1893 the legislature passed an act to provide for the appointment of a commission to prepare and report a general municipal corporation bill under which all municipalities may become incorporated. Attention was called to this act in the president's

last annual address.[2] Under this act a commission was appointed, but it has not yet reported a bill. The act requires that upon the bill being reported to the governor he shall cause the same to be printed and copies furnished to any person applying therefor, and it is to be hoped that members of the bar throughout the state will procure copies of this bill when it is ready and carefully examine it. It is doubtful whether any bill that may be reported by this commission and adopted by the legislature will cure the evil at which it is aimed. A constitutional provision restricting the granting of special municipal charters may be required before a stop can be put to such action of the legislature. However, such a bill is in the right direction, and if it fails to accomplish the desired result it will at least furnish argument for the adoption of a proper constitutional amendment.

In this connection I desire to call attention to the wholesale violation in this state of the letter and spirit of our constitutional provision against the creation of corporations by special act. Section one, article fifteen, provides: "Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes."

In the early history of this country the legislatures of the several states had, and exercised freely, the power of creating private corporations by special charter. A few men, having some scheme of personal advantage and emolument in hand, would apply to the legislature for a charter. As a rule nobody would be especially interested in it except the persons seeking incorporation. In practice it was found that such charters were not closely examined nor carefully considered before being adopted by the legislature, and great evils arose from that class of legislation. From time to time the different states have incorporated into their constitution provisions similar to ours. These provisions were intended to correct an existing evil, and to inaugurate the policy of placing all corporations of the same kind upon a perfect equality as to grants of power; to make all laws applicable to all parts of the state and all classes of people, so that the attention and vigilance of all representatives in the legislature with reference to such legislation might be secured; to make all judicial constructions of the powers of corporations or restrictions upon their powers equally applicable to all corporations of the same class. In many of the states, the provision is much broader than in Michigan, in that it includes municipal corporations, but the principle involved is practically alike in all. In each of the states various attempts have been made to evade the constitutional provision by conforming to the letter of the constitution without regard to its spirit. In Ohio the constitutional provision is, that "the general assembly shall pass no special act conferring corporate powers, but corporations may be formed under general laws." An attempt

[2] Mich. Law Jour. 235

was made to escape these constitutional restrictions on the theory that the phrase, "conferring corporate powers," meant conferring corporate existence, the creation of corporations, and it was said that if corporations were created under general laws the legislature might then proceed to confer upon such existing corporations as many and as varied powers as it pleased. But it was held in an early case[3] that such a construction would leave the door wide open for special legislation which the restrictions of the constitution were obviously intended to guard against and prevent. Such a construction was distinctly repudiated in that case, and it was said that constitutional provisions would be of little value if they could be evaded by mere change of forms.

In the later case of the *State v. Cincinati*,[4] the mischief intended to be guarded against by the adoption of this provision of the constitution is clearly pointed out by Chief Justice Brinckerhoff. He says: "These provisions of the constitution are as imperative, as comprehensive and emphatic, as if the people speaking through their convention had said: 'This bane and curse of our legislation as it existed under the latitudinary provisions of the constitution of 1802 is in the future utterly and absolutely prohibited. Henceforth, the laws conferring corporate powers shall be general, affecting or liable to affect the interests of the constituency of every individual member of the general assembly, and so by powerful motives calling his attention to the effect of proposed enactments upon his own immediate constituency as well as upon the people of other localities.'"

In this state the constitution has been evaded in numerous instances in the organization of private corporations by the very transparent device of authorizing any certain number of persons to organize a corporation under a particular name, as, for example, "Associations of Free and Accepted Masons," "Odd Fellows," "Good Templars," "Father Matthew Societies," "Societies of St. Patrick," "St. George's Societies," "St. Andrew's Societies," "Ancient Order of Hibernians," "Improved Order of Red Men," "Knights of Pythias," "Grand Council of Royal Arcanum," "Tents of Knights of Maccabees," "Associations for Promotion of Labor," "Merchants' and Traders' Associations," "Water, Storage and Supply Companies," "Maritime Commerce and Navigation Companies," "Land Purchasing and Improvement Companies," "Business Men Associations," "Publishing and Book-making Companies," "Telephone and Messenger Service Companies," "Camp Meeting Associations," "Co-operative Savings Association," "Exposition Building Association," "Land Dealing and Building Companies," "Hotel Elevator and Public Hall Associations," "Association for Purchase of Summer Homes," "Oil, Petroleum and Gas Companies,"—and numerous

[3] Atkinson v. the Marietta R. R. Co., 15 Ohio St. 21.

[4] 20 Ohio St. 35.

others that it would take too long to enumerate, and to the corporations so organized the legislature proceeds to give such special corporate powers as it sees fit.

It is difficult to see how the device of allowing any five or more persons to become incorporated with special corporate powers is different in spirit from an act conferring such powers upon five particular persons, especially when it is well understood that the particular act is to be made use of only by one corporation in the state.

In Pennsylvania, where there is a similar provision of the constitution, applying also to municipal corporations, an act was passed for the real purpose of allowing sessions of the court to be held at Titusville. But, to obviate the difficulty growing out of these consititutional provisions, the law provided that, "In *all* counties of this commonwealth where there is a population of more than sixty thousand inhabitants, and in which there shall be any city incorporated at the time of the passage of this act with a population exceeding eight thousand inhabitants, situated at a distance from the county seat of more than twenty-seven miles by the usual traveled public road, it shall be the duty of the president judge or of the additional law judge, or of either, to make an order providing for the holding of one week of court after each regular term of said court for the trial of civil or criminal cases in said city." This act was held to be unconsitutional. It was claimed on behalf of the act that it was a mere classification of counties, but the court said; "This is classification run mad. Why not say, 'All counties named Crawford with a population exceeding sixty thousand that contain a city called Titusville with a population of over eight thousand and situate twenty-seven miles from the county seat?' or 'all counties with a population of over sixty thousand, watered by a certain river, or bounded by a certain mountain?' "

In Wisconsin, the constitutional provision is as follows: "The legislature is prohibited from enacting any special or private laws for granting corporate powers or privileges, except to cities." In 1889, the legislature passed an act entitled, "An act to enable members of the Methodist Episcopal church or of annual conferences to form and regulate an insurance company," and providing that, "Any number of resident members of such church may form such corporation, etc." The supreme court of Wisconsin, in *State v. Cheek*,[5] held the act to be unconstitutional, saying, "We must hold that its purpose and object was to authorize the incorporation and organization of only one corporation, and hence is the same in effect as though the act had incorporated the company directly. Such a law is manifestly a special or private law within the rulings of this and other courts."

[5] 46 N. W. 163.

Without attempting any further review of the authorities, I feel justified in calling the attention of the association to what seems to me to be a clear violation of the constitution, and to the fact that the time of the legislature is largely taken up with the consideration of bills of this character, not because much attention is given to any special act but because of the large number of acts that have been from time to time adopted.

It would seem as though corporations ought to be divided—first, into public and private; public corporations again subdivided into cities and villages, and private corporation subdivided into corporations for profit and corporations not for profit—and that all persons desiring to form corporations should be required to organize under one or the other of such general laws. In the case of municipal corporations, as the constitution now is, we must depend altogether upon the good sense of the legislature. But as to private corporations it would seem to be within the power of the courts to call a halt upon legislative action.

These views are somewhat hastily presented, and the criticism offered may not apply with full force to all of the corporations whose names I have mentioned, but these suggestions will perhaps serve to invite discussion and may lead to a more critical examination of the subject on the part of some interested to go to the bottom of it.

EDWARD CAHILL, Chairman.

A paper was then read by C. L. Collins, of Bay City, entitled, "Some Practical Suggestions for the Amendment of Michigan Circuit Court Practice."

E. E. Osborn, of Ishpeming, then read a paper upon "Unjust Criticism of Courts and Juries." This was followed by one upon "Grand Juries," by O'Brien J. Atkinson, of Port Huron.

The report of the treasurer, E. D. Barry, of Grand Rapids, was then read, and on motion was accepted and placed on file. The report showed a balance of $193.30 in the treasury.

On motion the chair appointed the following committee to nominate officers for the ensuing year: Dallass Boudeman, Kalamazoo; James H. Pound, Detroit, and E. D. Lewis, Lansing.

C. P. Black, of Lansing, offered the following resolution, and moved its adoption:

"*Resolved*, that it be the sense of the bar of Michigan that the practice of the circuit courts ought to be reformed and amended along the line of the paper read by Mr. Collins."

Justice R. M. Montgomery thought that the matter should be more carefully considered and favored the appointment of a special committee to whom the paper should be referred with instructions to report at the next meeting of the association. On

motion to that effect the following were appointed as such committee: C. L. Collins, Bay City; C. P. Black, Lansing; Fred A. Maynard, Grand Rapids; E. F. Conley, Detroit, and E. E. Osborn, Ispheming.

Wm. K. Clute, of Ionia, made some remarks suggesting several needed reforms in legislation and offered the following resolution:

"*Resolved*, that the committee on legal education and admission to the bar take such steps as they deem necessary to secure the passage of a law at the next legislature providing for the appointment of a commission of five by the supreme court, to whom shall be referred all applications for admission to the bar."

After remarks by Dallass Boudeman and C. P. Black, the resolution was adopted.

Mr. Klute, in his remarks, called particular attention to the need of legislation giving a right to levy executions upon national bank stock; also to the need of reform in the laws as to garnishment of funds belonging to one of two joint or several debtors. After discussion these matters were referred to the committee on legislation and law reform.

James H. Pound, of Detroit, spoke energetically upon the need of a law more favorable to plaintiffs in actions on contract against several defendants. He offered the following resolution, which was unanimously adopted:

"*Resolved*, that the committee on legislation and law reform be instructed to procure the passage of a law allowing the taking of verdict and judgments in actions of contract, against those defendants against whom a complete liability may be established, and that in case of the trial of any action on contract in any court in this state, the plaintiff shall not be defeated by reason of suing too many persons as defendants, but shall have judgment against those whom the evidence shows be is entitled to a verdict and judgment against, and as to all other defendants they be discharged from any such suit with their costs to be taxed."

A spirited discussion then ensued upon the recommendation of Alfred Russell, made in the report of the retiring committee on legislation and law reform, that the verdict of nine out of twelve jurors be deemed sufficient in civil cases. Remarks were made by Justice Montgomery, O'Brien J. Atkinson, Fred A. Maynard, James H. Pound, E. E. Osborn and C. L. Collins. On motion of the latter, the matter was referred to the new committee on legislation and law reform with instructions to investigate and report at the next meeting of the association.

The following new members were then admitted to the association: C. F. Sawyer, Cadillac; J. B. Henden, Big Rapids; C. W. Perry, Clare; M. V. Montgomery and A. D. Prosser, Lansing; Harsden D. Smith, Cassopolis; John H. Farley, Carsonville; T. C. Quinn and Fred S. Wheat, Caro.

The report of the committee on nominations was then received, and the following officers elected for the ensuing year:

President, Martin V. Montgomery, Lansing; Vice-President, O'Brien J. Atkinson, Port Huron; Secretary, Eli R. Sutton, Detroit; Treasurer, Arthur C. Denison, Grand Rapids.

Directors by Districts: Philip T. Van Zile, Detroit; Thomas A. Wilson, Jackson; Edwin M. Irish, Kalamazoo; Harsden D. Smith, Cassopolis; Fred A. Maynard, Grand Rapids; Rollin H. Person, Lansing; Alex. R. Avery, Port Huron; Watts S. Humphrew, Saginaw; A. V. McAlvay, Manistee; Michael Brown, Big Rapids; E. E. Osborn, Ishpeming.

After being again reminded of the reception to be tendered by Justice Montgomery in the evening, the association was formally adjourned.

NOTES.

ERROR IN 71 MICH.—The State Reporter has asked us to call attention to an error in the report of a case in the seventy-first volume of the Michigan reports. In *Hewitt v. Circuit Judge*,[1] at page 295, the court is made to say that if a less number of jurors had been returned than required by the statute under consideration, "each person returned would *not* have been a legal juror." The word "not" is not in the original opinion. While this error, when the sentence in which it occurs is read with the rest of the decision, would seem to be almost self-corrective, it might have led to a wrong ruling in some other case.

PECULIAR BURDEN OF THE INCOME TAX IN ENGLAND.—The chancellor of the exchequer in answer to an inquiry addressed by a member of the house of commons gives it as his opinion that the proposed changes in the income tax laws in England will not change the provisions of the present law,[2] so far as salaries earned by husband and wife are concerned, and that such tax was properly calculated upon their two incomes added together, although separately both would be exempt from the income tax. This is a legal point in connection with pending bill in congress which does not seem to have received much consideration in this country.

ARBITRATION. — The June number of the *Harvard Law Review* contains an article entitled "Eighty Years of Arbitration," by H. A. Davis, which should command the attention of every person interested in the question of arbitration as a means of settling national and international difficulties. He gives a brief historical view of the subject and draws his opinions therefrom. While a historical review is undoubtedly the best method of judging of the practicability of any theory which has had a fair trial, we cannot say that the custom of submitting international disputes to a tribunal of arbiters for settlement has been in vogue for a sufficient length of time to judge of its expediency from an historical standpiont. Eighty years is a very short period in which to thoroughly test the adaptability of so revolutionary a method to the settlement of such questions, and we cannot judge at all of its practicability in those cases in which it has not been tried.

Mr. Davis says: "In disputes, religious and social, and

[1] 71 Mich., 287.

[2] Income Tax Act, 1842, s. 45.

struggles for independence, arbitration has no place." But Mr. Davis does not give credit to the fact that in these particular cases, arbitration has not been given a fair trial. The trouble here has been that arbitration has been attempted and moral suasion affixed when the passions were beyond control. It is perhaps true as Mr. Davis says that evil passions are inherent in mankind, and that war is the result of these passions, but they must be curbed while men and nations are in a state of peace and as the Scriptures say, "clothed and in their right mind." We, however, concur with Mr. Davis in the solution of the difficulty, namely: the promotion of a scheme for a permanent international tribunal, capable of enforcing its decree, and by whose judgment all must stand. Many plans have been outlined for the formation of such a tribunal, and we feel that it will be but a comparatively short time before some definite action will be taken looking towards that end.

UNIFORM SYSTEM OF EXAMINATION FOR ADMISSION TO THE BAR.—Last week Governor Flower of New York affixed his signature to a bill passed by the last legislature, known as the bill for the "uniform system of examination for admission of attorneys to the bar." It will go into effect January 1, 1895, and will be one of the most commendable laws upon the statute books of that state. The credit for the passage of the bill is directly due to the New York State Bar Association; and of its members none have been more untiring in their efforts to effect the passage of the bill than President Becker, and J. Newton Fiero, the last president of that progressive organization. The LAW JOURNAL[3] has repeatedly called attention to the need of just such a law in Michigan, and urged the State Bar Association to give the matter careful attention. If the members will take a determined stand and work unitedly for the enactment of such a law the legislature will not be slow to respond. The legislators, coming as they do from all classes of people, and engaged in varied occupations, have had abundant opportunity to test the fruits of our present lax system. They know full well the need of radical reform along the line. Let the members of the bar, in whom they have confidence, and upon whom they have a right to rely, take the initiatory steps, and the lay-men and lay-press, so called, will without doubt render their hearty support.

The *Albany Law Journal*[4] in commenting upon New York's new law concludes with these fitting words; "With the ripening of this system of examination for the bar, and with the careful record of the attorneys of the state, the profession will be greatly elevated in its tone, in the character of its members, and in its utility to the public, and we trust that the confidence of the

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[3] See "Requirements for Admission to the Bar," 1 Mich. Law Jour. 312.

[4] Vol. 49, p. 348.

people will be gained by our profession yearly, more and more, by reason of the benfits and results which the bill must surely bring."

RESPECT TO AMERICAN DIVORCES IN FOREIGN COURTS.—The *Law Journal* (London)[2] contains the following reference to a novel instance of the exercise of "judicial comity" by an English county court:

"In a recent case before Judge Bacon he was asked to decide a somewhat difficult point of international law. A man named Knewing was born and married in England, and subsequently went to and settled in California, where he remained for twenty-five years and became naturalized. He then returned to England. but his wife refused to go with him. While in England he became engaged to be married to a second lady, and after his engagement returned to California and got a divorce from his wife for desertion, apparently because she had refused to go to England with him. He then returned to England in July, 1892, and there married a third lady in November, 1892. Before his second marriage he made a settlement on his intended wife. Judgment was obtained against him, and execution was levied on furniture comprised in the settlement. A purchaser from the second wife claimed the goods and on an interpleader issue the execution creditor alleged that the wife's title to the furniture was bad, on the ground that the divorce, and consequently the second marriage, was invalid. The county court judge, however, declined to go behind the American decree of divorce, and upheld the validity of the settlement. We doubt whether his view as to judicial comity was right, inasmuch as the validity of the divorce in England depends on the domicile of the husband and the good faith of the application to the foreign court. But even had the marriage been void, we cannot see how the execution creditor could upset the sale to a *bona fide* purchaser by the second wife, whose title was at worst voidable."

THE STATE BAR ASSOCIATION MEETING—The fifth annual meeting of the Michigan State Bar Association, a partial report of which is given in this issue, while not as largely attended as it should have been, was much more of a success than it was anticipated a few days previous to the meeting. The absence of both the president and the secretary from the state for several weeks previous to the meeting, although unavoidable, was an unfortunate circumstance, as it disarranged the program, and prevented sufficient personal notice to the members. Nevertheless the meeting was a very successful and enjoyable one. The papers read were most excellent, and the discussions upon them, as well as upon various other topics, were interesting and animated. Some of the

[2] Vol 29, p. 303, May 12, 1894.

thoughts brought out, and suggestions made in the course of these discussions will no doubt bear fruit before the next legislature adjourns. The reform of the jury system, corporation laws, levy of execution upon national bank stock, garnishment of funds of several joint and several debtors, joinder of parties defendant, actions upon contract, circuit court practice, and admission to the bar were some of the more important subjects informally discussed. Too much attention by the thinking members of the bar cannot be given to any one of these subjects. The need of pronounced reform and immediate legislative enactment as to some of them is very apparent and universally admitted. With a little united, organized effort on the part of the members of the association—and that means every high minded member of the bar in Michigan, for it should contain them all—the desired and much need reformation along these lines can be secured. One criticism may possibly be made upon this meeting, viz: the evident willingness to postpone definite action, and shift the responsibility upon committees. It would seem that the influence of the association might have been sooner felt, had a more determined stand been taken. The reception tendered by Justice Montgomery, affording an opportunity to make the more intimate personal acquaintance of the justices of the supreme court, was one of the most pleasurable features connected with the meeting.

SHALL JURY TRIALS BE ABOLISHED?—There is probably no question more frequently mooted at present in the realm of legal discussion than that of the reform or abolition of jury trials. It is a subject which immediately and intimately affects all classes of people outside the pale of the legal profession, for it has been as liberally treated by the lay press as by legal journals and lawyers themselves. It is, too, probably the legal question of longest standing, dating back almost to the origin of the jury. As long as juries have rendered verdicts, there have been, in the nature of things, those who have been forcibly impressed with the defects in the system, and who have strongly urged either radical reform or entire abolition. The jury, however, seems to still remain firmly established as a part of the legal machinery of civilized nations, and there are even those who maintain that the attacks upon the jury have had the effect of more firmly intrenching it in public favor. The question, nevertheless, is still a very live one and will probably remain as matter for years of controversy. There is hardly a bar association meeting held nowadays at which the reform or abolition of the jury system is not made the occasion of animated and often heated discussion. Pamphlets and addresses are still being written by earnest advocates of retention and abolition very much after the fashion of the pamphlet wars of the England of the middle ages.

One of these pamphlets—and one of the ablest written that

has come to our attention—we have received through the courtesy of Judge Grove of the Kent circuit, who is himself a close student of all problems which concern the well-being of the legal profession. It is an address delivered before the Bar Association of the State of Kansas, by Charles B. Graves, of the Emporia, Kansas, bar, and is entitled: "Shall Jury Trials be Abolished in the United States?" It is an ardent defense of the jury, as being not perfect by any means but the best tribunal obtainable at present. Mr. Graves thinks that as long as the present jury system is satisfactory to the general public, it should be retained, since "this is the supreme test by which every law and every public measure and method should be tried and determined." Concerning one of the plans proposed as a reform, viz., the election of a jury to serve as a permanent body, Mr. Graves puts the following queries: "Where are the gentlemen having these ideal qualifications of wisdom, skill, experience and integrity, required of those who are to take the place of our juries to be found? When found how will they be placed in their offices, by appointor election? Will they be populists, democrats, republicans or prohibitionists? Will they be publicly accused, as the judges of courts now are, of deciding cases to advance the interests of the political party to which they belong, and to protect great corporations in return for courtesies extended and other valuable considerations received? If appointed, will it be by the governor, the central committee or the executive council or all combined? In either case, will the governor have the right of removal at will? If elected, what assurance have we that they will possess any of the ideal qualities aforesaid?"

Mr. Graves advances a somewhat new theory for the many miscarriages of justice and farces in jury trials. He says in effect that the real cause is incompetent judges and attorneys. He accounts for many of the queer verdicts by the anything but clear and intelligible instructions of the trial judge and the confusing statements of attorneys which result from hasty preparation or from downright incomptency. "Then," Mr. Graves says, "when the jury bring in a verdict which fails to show a clearer conception of the case than was possessed by either court or counsel, some gentleman rises in his place and gravely remarks that a jury trial is a farce anyhow, and the whole system ought to be abolished."

There is much truth in Mr. Graves' argument, and he makes a very strong showing in defense of the present jury system. But it is noticeable, nevertheless, that there are very many faults of the system which really demand correction, and if abolition is too heroic a cure, it is the place of Mr. Graves and others who think as he does, to suggest proper and sufficient modifications and remedies.

LAW SCHOOL NOTES.

E. F. JOHNSON, EDITOR.

H. C. WALTERS, ASSISTANT.

The Varsity base ball team started on its eastern trip on the 18th.

Upton, of Harvard, has been secured as coach for the football team.

The senior class has adopted a class cane. It is a crooked affair, English crab, with a silver tip—$18.00 per dozen.

Dean Knowlton's series of lectures on "Jewish Institutions in the Time of Christ," will be printed and on sale in the near future.

Michigan's representative in the Northern Oratorical league contest, Mr. F. P. Sadler, took first place at Madison in the recent contest.

The Webster society came out victorious in the recent debating contests with the Jeffersonians, and is now champion of the department.

The commencement programs for the senior class will be very fine this year. They will contain a list of the names of the members of the class.

Dean Knowlton is still delivering his early morning lectures to the senior class. Lube's Equity has been postponed until he has finished his course.

The senior annual "To-Wit:" is issued, and all but a few copies sold. Eight hundred were issued in all at a cost of about $850. They were sold at fifty cents each—the board of editors being able to do this on account of the large amount of advertising the book contains. It contains 236 pages, and is an octavo volume bound in stiff board, covered with fine linen. It was put on sale on Thursday and 700 copies sold in a few hours. The book is meeting with hearty and unstinted praise on every side, and from all departments.

On Monday, April 23, the class of '94 lost another member in the person of D. H. Wingert, of Hagerstown, Md. Mr. Wingert's sad end was a great surprise to the majority of his classmates who were home on their holiday trip, and, in consequence, unaware of his illness. The

morning exercises were suspended out of respect to his memory. The class passed suitable resolutions, and accompanied the remains to the station. Mr. Wingert was aged twenty-one and was a hardworking student. He expected to practice in his native town after July next.

Professor Griffin, in spite of the total loss of his hearing, is enabled to conduct his lectures to the classes in a highly satisfactory manner. The order which prevails could not be better, though, as the professor himself told the students, no noise which they can possibly make can reach his ears. The students sympathize deeply with him in his severe affliction, coming as it does at a time when his career appeared most promising. He is contemplating going to a New York institute for the dumb in order to learn the "appearance" of a sound, that is, to understand spoken words by the movements of the lips. It is extremely doubtful if that system of communication can ever become sufficiently useful to Prof. Griffin to enable him to conduct a case in court. Some of his friends are selfish enough to hope that it won't, in order that he may give his attention to works on Evidence, Federal Jurisprudence, and the Practice of the Federal Courts—works that he is eminently fitted to compile and which would certainly have a large sale.

At the recent meeting of the board of regents Dean Knowlton presented a report of the trip of the visiting committee which inspected the methods of instruction in eastern law schools. They visited Cornell, Harvard, New York Law School, Law School of the University of New York, Columbia, Yale, and Boston University Law School. The dean was much gratified upon noting the high opinion which the eastern faculties have of our school in Michigan. They feel that it must be a good course which draws 70 per cent. of its students from outside states, while they draw but 30 per cent. The methods of instruction, the committee found, varied at the different schools. The leading types are the text book and the lecture system. Columbia and Harvard use the case system. The dean advised the lengthening of the course to three years in order that new subjects could be taken up and the present course treated more thoroughly. In conversation with the writer he gave it as his opinion that the post graduate course will be included in the regular course if the term is lengthened. The department would thus give no master's degrees. The report was taken under consideration. No definite action has been taken in the matter, however, and the impression which has gone abroad that the board of regents intends to extend the course to three years at once, beginning with the first of the coming year, is a mistake. Such change, if made at all, will not be made next year.

MONTHLY DIGEST OF MICHIGAN DECISIONS.

ACCOUNTING—Settlement as bar—Res judicata.—After a suit for accounting has been settled for a net sum and the sum recovered with interest, a subsequent suit for acounting will be barred. Rayl v. Hammond's Estate. Grant, J.

AGENCY—Brokers, when agents—Ratification—Perishable goods—Rights of purchasers—A broker selling goods upon commission, his orders being subject to confirmation or rejection by his principals, is to be considered as an agent, but if his principals ratify his order they are bound to faithfully fulfill the terms of the contract. Where oranges were shipped F. O. B. and purchasers were not allowed inspection before delivery, but had first to pay freight and accept draft for price, and upon inspection, the fruit was found to be not was ordered, and purchasers notified sellers' local agent that they rejected the goods, and that sellers were also notified of said rejection, no word being received in reply by purchasers, they have the right to sell the oranges promptly for the sellers account, and charge him with the loss. Hitchcock v. Griffin & Skelley Co. Hooker, J.

ASSIGNMENT for benefit of creditors.—Fraudulent conveyance—Laches—Accounting.—Where creditors with a knowledge of all the facts have delayed for several years to assert their rights, the assignee, the conveyance to whom has been held fraudulent on a former appeal should, as to them, be charged in his accounting, only with what he has actually received for the property, and not with its estimated value. Cutcheon v. Corbitt. Montgomery, J.

ATTACHMENT—Right of assignee for benefit of creditors to question priority.—A common law assignee under our statutes is a representative of creditors, and as such has the right to question the priority of a lien levied upon attachment before the assignment. Emerson v. Detroit Steel & Spring Co. Montgomery, J.

ATTACHMENT—Dissolution—Jurisdiction of circuit court in chancery to dissolve attachment issued by superior court of a city.—Where an assignee of property finds it in the hands of the sheriff under an attachment issued by the superior court of a city, the circuit court of that county has jurisdiction of a bill in chancery for the dissolution of the attachment. Turner v. Hatch. McGrath, C, J.

ATTACHMENT—Conveyance to defraud creditors—Conveyance by husband to wife—Burden of proof—Evidence.—The conveyance by a husband of real estate, in which he has homestead interest, to his wife for other real estate, and at a time when his assets are greatly in excess of his liabilities, is not sufficient to authorize attachment on the ground that he has disposed of his property with intent to defraud creditors. In such attachment the plaintiff has the burden of proof to show the intent to defraud creditors. It is not evidence of fraud that he refused to disclose where certain property was kept, or certain funds deposited, when it appeared

that he was keeping it pending arrangements to satisfy some of his debtors, nor that he executed a mortgage for $100,000 but in fact only received $50,000, which he applied in payment of his debts. Iosco County Savings Bank v. Barnes. Long, J.

CARRIERS—Duty to provide means for caring for live stock.—A railroad having contracted to ship horses for a party and accepts such horses for shipment conditioned that such party shall load, unload, feed, water, and care for them while in transit, is bound to furnish the shipper opportunity to care for them. Smith v. M. C. R. R. Co. Montgomery, J.

CONSTITUTIONAL LAW—Inheritance tax.—Art. 14, § 14, of the constitution providing that every law which imposes a tax "shall distinctly state the tax and object to which it is to be applied," the whole of such an act or law is unconstitutional and void, for want of a valid provision, if it does not state the object to which such tax is to be applied. Chambe et al. v. Durfee, Probate Judge. Long, J.

CONSTITUTIONAL LAW—Construction of statute—Act 118, Pub. Acts, 1873, "to revise and consolidate" the laws relative to penal institutions, and the government and discipline thereof, and "to repeal all acts inconsistent therewith," though the acts revised and consolidated are re-enacted and published at length, does not violate Art. 4, § 25, Const., providing that the act revised and the sections altered or amended shall be re-enacted and published at length; the terms "revise" and "consolidate" implying the intention to include entire control over the subject, and the provisions of the act covering the entire management of such penal institutions. Ellis, Att'y Gen'l, ex. rel. Fuller v. Parsell. Grant, J. (58 N. W. 839.)

CONTRACT—Mistake—Reformation.—A mistake in the drawing of a contract by which the true intent of the parties is not expressed, may be corrected upon proof shown of such error. Burns et al. v. Coskey, Long, J.

CONTRACTS—Breach—Damages.—Where plaintiffs had a contract to lumber several tracts of land and defendants broke the contract by selling one of the tracts, plaintiffs had a right to abandon the contract, and recover as damages for the breach the profits they would have made on the whole job. The profits in such a case are ascertainable and not speculative. Lee v. Briggs. Long, J.

CRIMINAL LAW—Intoxicating liquors—Information—Election.—An information containing two counts, each charging a separate and distinct offence, one for keeping saloon open on Sunday and the other for keeping windows curtained, entitles defendant to an election. People v. Rohrer. Hooker, J.

CRIMINAL LAW—Obtaining money by false representations—Evidence.—In prosecution for obtaining money by false representations, circulars shown by defendant, containing false statements, by means of which one has been induced to join a benefit association, are admissible to show intent. People v. Shelters. Long, J.

CRIMINAL LAW—Evidence.—Cases will not be reversed because incompetent questions are asked and ruled out, on the ground that they might prejudice the jury. Evidence regarding the appearance of the defendant at the time of the commission of the crime is admissible. A

witness who had testified to the good character of the accused may be asked if he had not previously told another witness that he knew the defendant was a dangerous man. People v. Pyckett. Grant, J.

CRIMINAL LAW—Fees of attorney appointed to defend criminal, by whom fixed.—Under How. St., § 9047, providing that an attorney, in defending at the expense of the county a person charged with crime may receive an enlarged compensation for his services for following the case into another county or the supreme court, the court to which the case is removed cannot fix such enlarged compensation. Springer v. Board of Auditors of Wayne Co. Long, J.

DAMAGES—Recoupment—Proximate cause.—In an action to recover for building material furnished by plaintiff to defendant, where defendant seeks to recoup damages caused by rain to the building during delays in furnishing such material, the delays, not being the proximate cause, are not an element of damage. Carnegie, Phipps & Co v. Holt. Long, J.

DEEDS—From husband to wife—Rights of creditors.—A second conveyance from a husband to a wife, of land which had been originally conveyed to the husband by an administrator under defective proceedings upon which the first deed was based and which defect had been cured by new proceedings preceding the second conveyance to the husband, cannot be attacked by creditors of the husband, when the land is purchased with the wife's money, and especially where it was the custom, in previous cases, for the husband to take the title in his own name and subsquently convey to the wife. Morris v. Jansen. McGrath, C. J.

DOWER—Lands sold by husband subject to mortgage subsequently assigned to wife.—The wife of one who has conveyed land subject to her dower, and encumbered by a mortgage, who subsequently pays and takes an assignment of the mortgage, is only entitled to dower in the husband's equity of redemption. Bonfoey v. Bayne. Grant, J.

ELECTIONS—Election laws—Mandatory statutes—Quo warranto—Illegal votes—Harmless error.—Act No. 190, §3 2, Pub. Acts, 1891, relative to elections is mandatory. Such statute is not unconstitutional in that it puts unreasonable restrictions on the right to vote. (McGrath, C. J., dissenting.) In quo warranto proceedings to test the title to an elective office, instructions which authorized the jury to throw out the vote of an entire district, instead of apportioning illegal votes cast, are harmless, though erroneous, where the result would be the same if such illegal votes were apportioned. Ellis, Att'y Gen'l *ex rel* Reynolds v. May. Long, J.

EQUITY—Jurisdiction in ecclesiastical matters—Injunction—Dissolution—Mandamus will die to dissolve a writ of injunction, issued at instance of church trustees, to restrain the pastor from performing certain clerical duties, and voting at church elections. Ecclesiastical remedies must be exhausted before the aid of equity can be invoked. Buettner v. Frazer, Circuit Judge. McGrath, C. J.

EVIDENCE—Meaning of words—Impeachment—Declaration—Harmless error.—A builder is a competent witness to testify as to the meaning among mechanics, of the word "smokestack." A declaration which claims damages for injury to marble from iron rust and "other substances," is sufficient without stating what the other substances were. Where no foundation for impeachment has been laid it is not proper to introduce

testimony for the purpose of contradicting a witness who denies having made certain statements. Harmless error is not reversible error. Skelton v. Fenton Electric Light & Power Co. Hooker, J.

EVIDENCE—Indorsement of a certificate of deposit.—Where a person claims a benefit under a certificate of deposit, and suspicion is aroused as to the genuineness of the complete indorsement (it being indorsed "for C. & Co. account," in lead pencil, and the maker claims he indorsed it in blank) the burden is upon the party claiming under it to remove the suspicion by accounting for such inserted words. Where one of defendants testified that plaintiff told him when she indorsed the certificate that her husband had sent word that he wished the money placed to the order of C. & Co., it was error to permit the husband to testify that he had not sent such word to his wife. Von Eherenbrook v. Webber, et al. McGrath, C. J.

EXEMPTION—Extent of homestead right—Conveyance to avoid execution and to defraud creditors.—A conveyance, without any consideration, by a husband to a wife, of a part interest in lands owned in common by husband and wife, even though the part interest is worth less than the amount which is exempt from execution as a homestead right under Art. 16, § 32, Const., but the entire land worth more than the amount so exempt, is void as against creditors when the debts are created berore the conveyance. McBride v. Putnam. Long, J.

FIRE INSURANCE,—What constitutes vacated premises.—The conditions of a fire insurance policy as to vacancy are not violated and the policy is not invalidated if the owner and occupant of the insured property leave it for no definite length of time, and the property is visited by another from day to day, under instructions from the owner. Hill v. Ohio Ins Co. McGrath, J.

FRAUDULENT CONVEYANCE—The giving of several mortgages upon a stock of goods to cover existing indebtedness, among which is one to a son for money advanced nine years before, and the subsequent purchase of an assignment of the other mortgages and obtaining a bill of sale from his father to himself, of the goods, under which he afterwards transferred the property to his wife, is invalid as against creditors of the father. Rindge v. Grow. McGrath, C. J.

HIGHWAYS—Discontinuance.—The discontinuance, without notice, of a highway through a person's land, with reference to which his buidings have been located, is void. Curry v. Rogen, et al. McGrath, C. J.

HIGHWAYS—Powers of township highway commissioners to lay out roads across railroad depot grounds.—Highway commissioners can, under How. St., §§ 1298, 1322, lay out highways across village depot grounds, where the concurrent use of such grounds is not impossible, and it is for the railroad to show the incompatibility in the two uses. Battle Creek St. R'y Co. v. Tiffany. Hooker, J,

HUSBAND AND WIFE—Liability of wife—Notes.—A wife is not liable for debts contracted by husband in running a farm owned by her, and a joint note given therefor is without consideration as to her. O'Donnell v. Bray. Hooker, J.

HUSBAND AND WIFE—Separate maintenance of wife.—Act 243, Pub. Acts, 1889, providing for injunctions by wife against husband's disposal of his property and execution to enforce decree, does not impliedly repeal

How. St., § 6293, which provides that decrees for fixed payments separate maintenance may be secured on land and enforced by sale if necessary. Tobey v. Tobey. McGrath, C. J.

INFANTS—Actions for, how brought—Service of writs.—An action brought by an infant in the name of the next friend instead of in the name of the infant by the next friend is not invalid. Writs may be served by a brother of the next friend. Kees v. Maxim. Hooker, J.

INTOXICATING LIQUORS—Civil damages—Minors—Constitutional law. —Act No. 313, § 20, Pub. Acts 1887, providing for the recovery of not less than $50 in each case of a sale to a minor is constitutional. Cramer v. Davidson. Montgomery, J.

INTOXICATING LIQUORS—Damages—Injury to feelings.—An action against a saloon-keeper under statute for mortification and injury to feelings resulting from intoxication of a father cannot be maintained by a daughter of an habitual drunkard, when she was but eleven years of age at the time of the intoxication; neither can recovery be had for mental anguish on account of accident received while so intoxicated. Sissing v. Beach. McGrath, C. J.

INTOXICATING LIQUORS—Injuries to wife's feelings by sale to husband —Injuries to means of support—Hearsay evidence.—Under How. Stat, § 2283 e 3, a wife can recover damages against a saloon-keeper for injuries to feelings, being the disgrace and discomfort caused by the drunken condition of her husband, but cannot recover for injuries to the means of support when the alleged injuries affect doubtful prospective wants. The fact that the wife drank with her husband at one time will not prevent her recovery. A prosecuting witness' memory cannot be refreshed by questions suggesting a conversation between the witness and a third party which did not take place in the presence of the defendant, the evidence of such conversation being hearsay. Radley v. Seider. Hooker, J.

LEASE—Removal of property at expiration—Construction.—The lessee of land under a lease allowing him to remove his buildings " at the end of the term," is entitled to go upon the property for such purpose for a reasonable time after the expiration of such lease. Davidson v. Cump M'f'g Co. Hooker, J.

LIENS—Enforcement of mechanic's lien—Defenses.—In a building contract which provided that the price of extra work and material, unless agreed upon, should be settled by arbitration, a lien therefor cannot be enforced in the absence of such agreement or settlement. Boots v. Steinberg. Hooker, J.

LIENS—Statutory logging lien—Jurisdictional defect.—In a suit to enforce a lien on logs under Pub. Acts 1889, the failure of the return to show service of a copy of the inventory of the property seized on the principal defendant, or the owner of the logs, is a jurisdictional defect. Davison v. Davison. Grant, J.

LIFE INSURANCE—Conditions in policy in conflict with statute.— Where a statute requires that notice of each assessment made by a life insurance company shall state the purprose thereof, that no policy shall be forfeited for nonpayment of premium, without notice, and that if payment be taken to be in full compliance with the requirements of the policy, anything therein to the contrary notwithstanding, a condition in the policy that the notices given in the policy shall be sufficient

for the several periods of assessment during the year, will not bind the insured, it being in direct contravention of the statute. Warner v. National Life Ass'n of Hartford. McGrath, C. J.

LIFE INSURANCE—Delay in payment of premium note—Cancellation.—The failure of an insured to promptly pay his premium note for life insurance to the agent who had paid the amount of the premium to the company does not amount to a cancellation of the policy. Krause v. Equitable Life Assurance Society of U. S. McGrath, C. J.

MASTER AND SERVANT—Breach of contract of employment—Burden of proof.—In an action by a wrongfully discharged servant for breach of contract of employment the burden of proof is upon the master to show what effort has been made by the servant to obtain other employment during the remainder of the period for which he was hired. Allen v. Whitlark. Hooker, J.

MORTGAGE—Priority—When proceeds of sale to be divided.—Where two mortgages are given the same day the proceeds of the sale should be divided pro rata. Grunert v. Becker, et al. McGrath, C. J. (Montgomery, J., dissenting.)

MORTGAGE, to trustees to secure creditors—Contingent claims—Distribution of assets—Vacation of order.—The circuit court has a right to vacate an order which it believes is not in accordance with the directions of the supreme court thereto. Where a mortgage is given to a trustee to secure several creditors and contingent liabilities among the others, the dividends should be apportioned according to the par value of the claims, and if afterwards any of such contingent claims are paid by the makers, the amount apportioned thereto should be considered as a part of the general fund and redistributed according to the face value of the remaining claims. Such sum cannot be applied upon any special claim of one of the creditors. Fifth Nat'l Bank of Grand Rapids v. Clinton Circuit Judge. Hooker, J.

MORTGAGES—Rights of assignee of decree—Power of administrator to assign.—Under How. St., §§ 6711-6714, and Chancery Rule No. 125. an assignee of a mortgage payable in installments and of a decree rendered upon default in payment of an installment, finding the amount then due and to become due, may be substituted as complainant, and on default in payment of another installment elect to declare the whole amount due and have the property sold under the decree. Such decree being personalty, an administrator has authority to make the assignment. Brand v. Smith. Long, J.

MUNICIPAL CORPORATIONS—Vacation of alleys—Rights of abutting owners—A city, in altering or vacating an alley, under How. St., §§ 2622-23, must compensate abutting property owners. Horton et. al. v. Williams. McGrath, C. J.

MUNICIPAL CORPORATIONS—Liability for defects of street car system.—A city is bound to see that the construction of tracks in streets does not necessarily interfere with or endanger other uses of the street, but they are not insurers of street-car passengers against defects in the street-car system itself. Kennedy v. City of Lansing. McGrath, C. J.

MUNICIPAL CORPORATIONS — Salaries of city officers — Legislative power.—Where the legislature has not delegated the power to fix the salaries of the city officers—under Art. 4, § 38, Const., providing that the

legislature may confer on cities such local and legislative power as it may deem proper—it may exercise such power. Speed v. Common Council of City of Detroit, et al. Montgomery, J.

MUNICIPAL CORPORATIONS—Excessive indebtedness—Where a city is given power to purchase from a water works company all its pipes laid in streets, stock and franchises, and provide for payment by bonding, except that its total debt for borrowed money shall not exceed 5 per cent. of the assessed valuation of property therein, cannot purchase the company's equity of redemption, which, as a debt of the city, would be excessive. Ironwood Water Works v. Trebilcock, Mayor. Grant, J. (58 N. W. 371).

NEGLIGENCE—Duties of steamboat companies to prevent fires—Modern appliances—Instructions.—Where a steamboat company uses appliances shown to be reasonably effective to prevent sparks from setting fire to property along the shore, it is error to instruct the jury that they might find that some other device should have also been used. The common law liability of vessel owners to use precautions against fire is not affected by Rev. St., U. S., § 4470. Cheboygan Lumber Co. v. Delta Transportation Co. Grant, J.

NEGLIGENCE—Contributory negligence—When negligence of driver imputed to passenger.—A person of mature years and judgment who enters the carriage of another and places herself for the time being under his control and subject to his judgment in directing the horse, becomes so identified with him as to make his negligence imputable to her, and the negligence of a municipal corporation in leaving obstructions in the road over which the driver carelessly drove and thereby caused the plaintiff's injury does not warrant a recovery. Mullen v. City of Owosso. McGrath, C J. Hooker and Long, JJ., dissenting.

NOVATION—Evidence—Statements by an original debtor subsequently confirmed by defendant, are admissible to show a novation or substitution of debtors and the release of the original debtor. Grieb v. Comstock. McGrath, C. J.

PLEADING AND PRACTICE—Construction of words—Error made immaterial by instruction.—Where a declaration avers that plaintiff was the owner of "a shingle mill outfit, consisting of engine, boiler, bolts, saws, pulleys and other *machinery*," a smokestack is properly held to be included. The admission of evidence erroneously, which afterwards became immaterial under an instruction, is not ground for complaint. Weggitt v. Barnett. Hooker, J.

PROBATE LAW—Construction of statute—Production of documents affecting title of deceased. Under How. Stat., § 5876, if an executor or administrator has an opportunity to examine documents and writings in the possession of other parties, which contain evidence of the interest of the deceased in any property, he cannot compel such person to answer interrogatories or to furnish a schedule of the documents. Manly v. Washtenaw Probate Judge. Grant, J.

PROBATE PRACTICE—Widow's allowance—Notice to administrator—Effect of re-marriage—Written notice of the administrator of claim of widow's allowance is not necessary. If it appear that he had actual notice it is sufficient. A widow is absolutely entitled to a reasonable allowance from the estate of her deceased husband for a period of one year, and such allowance may be extended for a longer period at the discretion of the Probate Judge. Where decedent's estate was in litigation, and no money

had come into the hands of the administrator until after the marriage of the widow, the fact that she re-married before applying for allowance does not bar her right to allowance for period of her widowhood. Bacon v. Perkins, Probate Judge. Long, J.

RECEIVERS—Grounds for appointment—Where a street railway company issued bonds and gave a mortgage to trustees to secure payment of same, and it is provided that if default be made in payment of interest, such mortgage shall be foreclosed for benefit of bondholders, and it afterwards appears that such trustees have tendered their resignation, and that the company has no officers, and its officers in general are in a chaotic condition, it is sufficient grounds for the appointment of a receiver to protect the bondholders. Ralph v. Shiawassee, Circuit Judge. McGrath, C. J.

RELIGIOUS SOCIETIES—Rights and powers—Property rights.—A religious society organized under Pub. Acts, 1885, No. 145, becomes a corporation for the management of the temporal affairs of such society, and such corporation has nothing to do with the church except to provide for its wants. On the other hand the church has nothing to do with the temporalities. Wilson v. Livingstone. Hooker, J.

REPLEVIN—Affidavit—Defect cured by amendment—A writ of replevin is not void because the affidavit omits to state that the property is not taken for any "assessment." Such defect may be cured by amendment. Taylor v. Kalamazoo. Circuit Judge. McGrath, C. J.

STREETS—Dedication—Restrictions as to use.—A strip of land which has, in a dedication of certain streets to a city, been reserved for "sidewalk, shrubbery and ornamental purposes," may, by subsequent use as a street without restriction, become a part of the street. Dickerson v. City of Detroit. Hooker. J.

TAXATION—Drain tax—Validity.—A drain tax paid under protest cannot be recovered merely on account of failure to file the record of the location and construction of the drain with the county clerk as required by law. Matau v. Tompkins. Long, J.

TAXATION—County property exempt from taxation by a municipal corporation.—A city connot compel a county to pay an assessment levied upon county property for a local improvement. City of Big Rapids v. Board of Supervisors, Mecosta County. Grant, J.

TAXATION—Municipal improvement—Conflict between act of legislature and city charter—Power of city council to enlarge district.—Act 124, Pub. Acts, 1883, which provides for the taxation of lands for public improvements, and permits the levying and collecting of them according to the city charter, does not violate section 14, acticle 14, of the constitution, which provides that the object of a law imposing a tax shall be distinctively stated, and that no other law can be referred to to fix such tax or object. The above act fixes both the tax and the object, but refers to the city charter for the machinery to be employed in making the assessment, and levying and collecting the tax. Council has the power to reconsider the resolution fixing the district to be assessed, for the purpose of enlarging the district. Trowbridge v. City of Detroit. McGrath, J.

TAX SALES—Evidence—Collateral attack.—Tax rolls and tax deeds are inadmissible in evidence to prove invalidity of tax in action of ejectment against one claiming under a tax deed. Jurisdiction may not be collaterally attacked upon evidence *dehors* the record. Watts v. Budlitz. Grant, J.

TRIALS—General and special verdicts—Which to govern when incon-

sistent.—When a jury returns a special finding which is inconsistent with the general verdict, the former shall control. Trevor v. Hawley. Hooker, J.

TRUSTEES—Sale of stock—Fraud.—The trustee of stock cannot be held to be guilty of fraud because he sold such stock at a time when such sale seemed to be for the best intertests of the *cestues que trustent*, and the fact that such trustee himself held stock in the concern which he did not sell, and the stock after several years doubled in value under a different management of the concern, is not evidence of fraud. Owen v. Campbell. Hooker, J.

VENDORS—Agreement to defend possession.—A vendor of land, who has agreed to defend any action which may possibly be brought by one claiming an option of purchase, is deemed to have fulfilled his agreement when he engages counsel for that purpose. who are approved by the vendee, though the counsel selected fail to give the case proper attention, when the vendee's own neglect has contributed to the failure of the counsel so employed. Catharin v. Knoch. McGrath, C. J.

BOOK REVIEWS.

BROWNE ON SALES.—The Elements of the American Law of Sales of Personal Property. By Irving Browne. Boston: The Boston Book Company. One vol., 8vo. 224 pp.

Irving Browne writes law books with the same pen with which he writes legal articles and editorials. His books show the same originality of style and thought. They are also evidently written with the same object in view, namely, the economy of space. His long experience as editor has taught him the value of space, and the full meaning of the phrase *multum in parvo* as applied thereto. He has therefore been able to put into but 208 pages of text what one less experienced would have required many more pages to say with no more clearness. The work is divided into six parts, each containing from three to eight chapters. The notes contain a large number of citations to important American cases. The value of the citations is increased by citing not only the official reports but also the "American Decisions" and "American Reports," and the "L. R. A." From several important decisions copious quotations have been taken and republished in the notes. These oftentimes tend to explain a principle more clearly and to fix it more firmly in mind than a mere statement in the text. The author has not been afraid to express his own views when they are in conflict with other text writers upon the subject. He has not, however, gone so far as to be open to criticism as being radical. In chapter four of part three he advances some very sound arguments in opposition to the quite generally accepted theory that where shipment is made "C. O. D." the title passes by the delivery to the carrier. Part four, which treats upon the avoidance of the contract, and part six upon the breach of the contract, contain some chapters of particular interest. The work has been written with the primary object to furnish a concise treatise upon the subject as a manual for the use of students. As such it will certainly be received with great favor. The excellent manner of arrangement and the peculiarly entertaining style of the writer will make it equally popular with both students and instructors.

JONES ON MORTGAGES—By Leonard A. Jones. Fifth Edition. Two volumes, 8vo.. pages 983, 1006. Price, $12.00. Boston: Houghton, Mifflin and Company.

This is the fifth edition of Mr. Jones' work on the law of mortgages of real property. The two volumes are considerably revised and enlarged, about four thousand new cases decided since the publication of the last revision, being incorporated. The section numbers used in previous editions remain unchanged, except in the two chapters relating to registration and notice, the sections in these chapters being numbered anew on account of the large omissions and additions. The author acted wisely in generally retaining the same section numbers as in the previous edition; so much confusion is occasioned by references in briefs to the same section under different numbers in different editions. The present edition contains citations of more than twice the number of cases contained in

the original work, and the text has been enlarged by several hundred pages of new matter. There are references to the reporters of the national reporter system, and to the American decisions, American reports, and American state reports. The material changes in the subject matter of the work are the omission of all sections treating of vendors, liens—as this subject is covered by "Jones on Liens;"[1] the omission of detailed statements of the statutory provisions relating to the recording of mortgages, the statutes being only briefly referred to, and the insertion of a statement of the general law governing registration and notice. Two of these changes are beneficial to the work, but we cannot endorse the removing of the statutory provisions relating to recording. The practical value of the work to lawyers in small cities and towns, which are without complete law libraries, is lessened by this omission. A clear general statement of statutory provisions is probably sufficient for ordinary cases, but there are times when lawyers wish to examine the statutes themselves, and then the extracts from the statutes cause the book to be appreciated, an appreciation that aids in its sale.

Absolutely no exception can be taken to the mechanical work of Houghton, Mifflin and Company. The two volumes will grace the shelves of the most fastidious of lawyers.

WILLS AND HOW NOT TO MAKE THEM.—By B. B. Watson. Boston and New York. Longmans, Green and Company.

This is a breezy little book, from the tone of which throughout one would suppose that the writer had experienced the not altogether pleasing sensation of being "cut off with a shilling" by some eccentric, wealthy ancestor. He stamps the practice of making wills as a pernicious one, and makes the somewhat broad statement that "if the plain truth were told, it would be acknowledged that more misery and injustice have been worked by wills than by the series of wars the country [meaning England] has waged since the modern system of will making came into use." The author thinks that the intestate laws, although none too perfect themselves, are vastly superior to wills as channels for the equitable descent of property.

The book is not a legal treatise, but a popular treatment, in an entertaining vein, of will-making and its evils. It is an extremely one-sided discussion, and is probably more properly an argument against will-making. The argument is divided into two parts, "testamentary abuses" and "the remedies." At the conclusion are a few leading cases upon testamentary undutifulness, confusion, accidents, and malice, which is the only feature of the book of practical value to a practitioner. The testamentary abuses are treated in rather unique divisions, commencing with a one-page comment upon the testator, and following this with the testators "moods," the active mood and the multifarious moods. The active mood is exemplified by the angry testator, the crotchety testator, the testator of principle and the fussy testator—the wife robber. These are the most spicy and entertaining chapters in the book. The remedies or reforms the author divides into voluntary, judicial and legislative. Childless and parental testators are dealt with unsparingly, and the doctrine of *cy pres* is pronounced absurd. The little volume abounds in citations of the provisions of eccentric wills, and altogether furnishes an entertaining two hours reading.

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[1] See 3 Mich. Law Jour. 84

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SOME PRACTICAL SUGGESTIONS FOR THE IMPOVEMENT OF MICHIGAN CIRCUIT COURT PRACTICE.

C. L. COLLINS.

A full statement of the subject of this paper is:

Practical Suggestions for the Improvement of the Practice in the Circuit Courts of Michigan without Changing the System of Practice Therein, Including Suggestions for Particular Amendments and for a Revision of the Rules and Statutes Regulating Circuit Court Practice.

The sources of Michigan circuit court practice are: The constitution of 1850; the revised statutes of 1846, with additions and amendments since that date, and the code of rules enacted in 1858 by the supreme court, with additions and amendments to date. This practice is the common law and equity practice as modified by statutes and rules of court.

The constitution does not in any place mention courts by the designation of courts of law or courts of equity, or mention any court as circuit court in chancery. The constitutional designation is simply circuit court. By the constitution the supreme court is empowered by general rules to establish, modify and amend the practice in circuit courts. And the constitution also requires the legislature to abolish the distinction between law and equity proceedings as far as practicable.

Under these provisions of the constitution the legislature, in 1851, passed "An act to provide for the organization and powers of the supreme court." By this act its was provided among other things, that the judges of the circuit court should have the power, and it should be their duty within three months after the taking effect of the act, by general rules, to establish and from time to time modify and amend the practice in circuit courts in law and equity proceedings, in cases not provided for in any statute; and

once at least in every two years thereafter, if necessary, revise such rules with a view to the attainment of the following improvements in the practice:

Abolishing distinctions betwee law end equity proceedings so far as practicable.

Abolishing all fictions and unnecessary process and proceedings and all unnecessary forms and technicalities in pleading and practice.

Simplifying and abbreviating pleadings and proceedings.

Remedying such abuses and imperfections as may be found in such practice.

It may be said as to the requirement providing for abolishing distinctions between law and equity proceedings so far as is practicable, the legislature has imposed upon the supreme court a duty which it was itself, by the constitution, required to perform. But whether this is true or not, by the other powers given to the supreme court, it is permissible for that court to make the improvement required by the statute. The legislature has not undertaken specifically to pass acts to abolish the distinctions between law and equity proceedings, nor has the supreme court by rule undertaken to accomplish this specific purpose, but many of the rules of the court, and many statutes have indirectly tended to that end, and there is much less difference between the practice in law and equity proceedings now than there was when the constitution of 1851 was adopted.

The distinction between law and equity as rules of jurisprudence has been maintained by the statutes and decisions since the adoption of the constitution. But the fact that there is a system of jurisprudence called law, and another system called equity, does not make it necessary to have different systems of practice. Looking at the question from the standpoint of practice, the only essential differences between law and equity proceedings are these: The manner of taking and procuring the testimony is different; in equity cases all questions are tried and decided by the court, without the intervention of a jury, whereas, it is a right to have a trial by the jury in law cases. So that from this standpoint if there is one procedure for the taking and preservation of testimony and the trial of law cases, and another procedure for the taking and preservation of testimony for and the hearing of equity cases, provision would be made for all the essential differences in the practice under both systems.

But the claim that from the standpoint of practice the only essential difference between law and equity practice is the different manner of taking and preserving the testimony and the trial in the one case by a jury and the other by a court, which is asserted with the utmost confidence as to its correctness, is going farther in the direction of uniformity to law and equity procedure than will be urged in this paper. It is however contended that as to the process in and the manner of the commencement of actions, and the practice as to appearance, motions, the taking of depositions and other incidental items, it is easily practicable and it would be an improvement to have the proceedings and forms the same in law as in equity actions. And there are many forms and many proceedings in practice which, as a matter of convenience, should be uniform in law and equity procedure. And in drafting rules or statutes for improving the practice as provided by the constitution and statutes it does not follow that either system should be given precedence over the other, the better of the two methods of doing the same thing should be chosen and if possible improved.

It is plain that every separate step and every requirement whether of court rule or statute between the commencement and hearing of a cause is a step which imposes labor upon attorneys, expense upon litigants, and danger of mistakes which result in delays, labor and expense. And these are aggravated by the necessity of doing the same thing in different ways in the same court. Every change in the practice, which relieves counsel from unnecessary steps in the conduct of causes and reduces to one method the different methods of doing the same thing is a beneficial and advantageous change both to lawyers and clients. In the various and difficult questions of law arising at the present time, and the complicated and varied disputes of fact incident to the energy and progress of the age, there is room for all the energy, skill and ingenuity of lawyers on the absolute essential points without their being hampered by unnecessary requirements on points not so essential.

With these general remarks, which it is hoped will be borne in mind, I pass to some specific points which I desire to lay before this association.

1. There should be a revision and consolidation in one act of the legislature of all the statutes and rules relating to the commencement of actions at law, and equitable actions.

Under existing statutes there are six methods of commencing these actions: By summons, by declaration, by capias, by attachment, by replevin in law, and by subpœna in equity. Whereas there is no necessity for more than one method, and that by summons. In an act providing for the commencement of all actions by summons, it can be provided that when a copy of the declaration or bill is served with the summons, the defendant must answer within twenty days after such service, but where no copy of the declaration or bill is served with the summons the defendant shall have ten or more days after such service in which to enter his appearance and demand a copy of the declaration or bill, and fifteen or more days after the receipt of a copy of the bill or declaration, in which to answer the same. The service of the copy of the declaration or bill with the summons would correspond with our commencement of suit by declaration, with all its benefits, and free from the necessity of entering a rule in court. The act should provide that the placing of the summons in the hands of the proper officer, if followed by the filing of a declaration or bill, should be the commencement of suit, and that such officer should endorse on every summons the date and hour of the record of the same. When a copy of a bill is not served with a summons the plaintiff should be permitted to file his bill or declaration within some definite time, say ten days, after the issuance of the summons.

Under the theory of this method of commencing suit the remedies by attachment, by capias and replevin in law actions, and by injunction in equitable actions would be auxiliary to the main proceedings, and would proceed as provided for by existing statutes as modified by the proposed act as to commencement of suits. The acts providing for these remedies should be amended so as to harmonize them with the proposed act as to the commencement of actions. This act should contain all provisions for serving process upon corporations of all kinds, and upon persons under disability, and for obtaining service on non-residents and parties who cannot be found, and should lay down the rules under and pursuant to which substituted service might be had, and no such service should be had in any case except by a proper order of a circuit court commissioner or circuit judge. The practice in obtaining, publishing or serving orders for substituted service should be uniform in law and equity actions. The present practice in chancery cases seems to afford a good groundwork for such uniform practice.

2. In many miscellaneous matters the proceedings in law and chancery cases should be assimilated.

In the making and presentation of motions the proceedings in law and chancery cases are different. It is not a matter of much consequence which practice as to motions is adopted, but one practice is sufficient for both classes of cases, and the proceedings in chancery cases is simpler and nearer a correct practice than the practice of law cases in respect to motions. The simplest and best practice would be to permit the moving party to adopt one of the two methods, either to file his motion in the case and then give notice according to the rule and practice of the court for the hearing of the motion, serving at the same time copies of the motion papers, or to permit him to give notice that on a named day the motion will be presented, serving at the same time copies of the motion papers. In the last case the notice papers would not be filed until the day of the hearing of the motion. And the circuit judge should be authorized to fix the time of notice of hearing of motion and the manner of serving the same in special cases.

There are many other incidental matters in which the pratcice of law and chancery cases might be assimilated. I note one other. In both law and chancery cases provision is made for the service of papers by mail. Under the law rules an attorney residing in a city ninety miles from the residence of the opposing attorney and desiring to serve a notice on him by mail must allow one day only for the intervening distance, but under the chancery rules a solicitor, under the same circumstances, must allow six days. Can any one suggest any good reason for this difference in the practice?

3. Improvement should and could easily be made in the rule of pleading as to declarations and as to forms of action.

A pleader should not be required to set forth any fact in any declaration which a plaintiff is not required to prove to maintain his action, except in cases where formal statements are required by specific statute or court rules. And it should be expressly enacted by statute or court rule that no declaration should be deemed insufficient in law which sets forth facts entitling the plaintiff to recover.

Assumpsit should be retained maintainable in all cases where now allowed and as the only action on express or implied contracts. Trespass should be retained as the only action for a wrong; and ejectment, as the only action for the recovery of real

specific property should be retained. The actions of covenant and debt should be abolished. Assumpsit is now maintainable in every case where covenant or debt lies except in the single case of a suit on a contract under seal brought after the expiration of six and within ten years after the cause of action accrues. Under existing statutes an action of trespass on the case is maintainable for personal injuries and injuries to personal property, but this does not meet the case.

With these proposed rules as to forms of action and pleading in force we would have forms of action sufficient for every legal object and sufficient to satisfy every logical reason; and rules of pleading which would render unnecessary all fictitious and perfunctory statements, but which would still retain a pleader to state such fact as shows his clients' rights to recover, and a long step would be taken in the direction of a compliance with the constitutional and statutory requirements hereinbefore cited.

If illustrations are needed reference could be made to the statutes of other states in which these rules are in force. In Florida, where the old common law practice as to forming an issue by successive pleading is strictly observed, the legislature has abolished all fictions in pleading and all statements not required to be proven, so that in that state pleadings are reduced to simple, clean-cut statements of fact.

As to forms of action Massachusetts has in effect the principle contended for, calling the actions however contract and tort, instead of assumpsit and trespass. There is however no good reason why the old names assumpsit and trespass should not be retained,and this has been done in Pennsylvania, where all actions on contract, except assumpsit, and all actions on tort, except trespass, have been abolished.

Illinois has gone part way in this direction. By statute the distinction between trespass, and trespass on the case, is aboliseed, and either form may be used in any case where either action is maintainable. This practice is preferable to our existing practice, but not so good as the proposed practice.

The proposed change would require the amendment of section 8713 of Howell's Statutes relating to the limitations as to actions, which amendment should consist in simply omitting the names of the forms of action described therein. With this exception it is believed no other statutory change would be required to make the proposed amendment.

4. There should be a change in the practice in respect to the notice accompanying pleas in law actions.

A defendant who admits the facts set forth in a declaration, but sets up a defense to the facts so admitted, or a set-off to the claim in the declaration, should be permitted by notice, or some equivalent method, to admit such facts and set up his own defense or claim of set-off, and have as a matter of practice what he has in legal effect the burden of the proof, and have the right to the opening and closing in taking the testimony and in the argument on the trial of the cause. The Michigan practice on this point is an anomaly. It seems plain that where a plaintiff sues a defendant on a promissory note, the defendant who admits the execution and delivery of the note, but relies on an affirmative defense, as that the consideration has wholly failed, to defeat a recovery on the note, should be permitted to admit what he does not dispute, and be required to set forth the facts on which he relies as a defense, and have the opening and closing in introducing testimony and in the argument on the only issue tried in the case. The office of a notice in such a case would be no broader than its present office in giving notice of set off. And as a matter of pleading the difficulty would be no greater than in such case. And whether this proposed change is or is not made, the use of the notice attached to the plea should be broadened so as to require notice of each affirmative defense, on which a defendant relies.

5. The right to interpose a set off should be so enlarged as to permit a defendant sued in assumpsit to set off any claim against the plaintiff owned by him when the action was commenced against him and recoverable in assumpsit.

In an opinion, filed last January, the supreme court of the United States, per Mr. Justice Jackson said, "The adjustment of demands by counter claims or set off, rather than by independent suit, is favored and encouraged by the law to avoid circuity of action and injustice." And as illustrative of the ground therein stated attention is called to the fact that in many cases parties are sued in the county of their residence by non-residents, not only of the county, but of this state, and it is gross injustice to defendants in such cases not to be permitted to set off any claim on express or implied contract they may have against the sueing plaintiff.

Good reasons may be given for withholding the right to set off claims in tort, but the decided weight of reason favors the rule under discussion.

6. When a defendant is brought into court by a plaintiff he should be permitted in that action to plead and prove any defense, whether legal or equitable, which would defeat the plaintiff's recovery.

Such a rule would avoid circuity of action, and in many cases, as when the plaintiffs are non-residents, save great cost and even hardship. And if his defense is an equitable defense he should not be required to commence an action in equity to establish his defense, but should be permitted in that action commenced against him to try his equitable claim. The court in such cases should try the equitable issue first, and if the trial of such issue should show the defense well taken such trial of course would terminate the suit, but if the court should decide against the plaintiff then the trial of the law issue should be proceeded with to a termination.

The procedure in such cases might at first seem difficult, but in practice it would not be found so. In such cases, if it was thought the rules as to notice accompanying pleas insufficient for stating an equitable defense, then the defendant should be required to file a pleading in the nature of a cross bill to which the plaintiff might answer and the issue thus raised be tried by the court as an equitable issue.

Neither should a plaintiff be turned out of court because he sues at law when he should have sued in equity, or sues in equity when he should have sued at law. In case of a mistake of this kind the court should by order transfer the issue to the proper docket to be tried by the proper method.

It is worthy of notice that the legislature of the state of Maine, which is one of the old common law states, has lately enacted a statute which contains provisions providing for the last two proposed changes.

7. When an action in assumpsit is brought by a plaintiff against parties sued as joint contractors or debtors, the plaintiff should be permitted to recover against such of the defendants as the jury find are jointly bound.

He should not be put to risk of being required to discontinue as to one defendant or suffer a verdict against him as to all of the defendants when there is any doubt about the fact, but should be permitted in such action as in an action for a wrong to try the question recover against those the jury find are indebted and suffer defeat as to those the jury find not indebted.

8. In the interest of simplicity and brevity on the one hand,

and logical clearness and accuracy of statement, and the convenience of court and counsel on the other hand, additional rules of equity pleading should be established.

In equity pleadings the pleader should be required to omit from all pleadings all fictitious and unnecessary repetitions and all statements not required to be proven. And whether an answer is sworn to or not a defendant answering should be required to answer fully every allegation in the bill, material to the issue as to him. In default of which every material allegation not so answered should for the purpose of the action be taken as true.

In every bill of complaint the statements made therein should be divided into paragraphs and numbered consecutively and each paragraph should contain, as nearly as may be, a separate and distinct allegation. And the prayer of the bill should pray specifically for the relief complainant believed himself entitled to, and also for general relief, and should be subdivided into paragraphs, numbered consecutively, each paragraph praying separate relief. And every answer should be divided into paragraphs numbered consecutively, and each pargraph should contain, as nearly as may be, as eparate and distinct allegation, and the answer should state the matter answering the allegations of the bill before it entered upon any statement of the defendant's case or statement of the facts upon which the defendant claims by answer the benefit of a cross bill.

The signatures of solicitors to pleadings should be sufficient, without the signatures of counsel. And there is no good reason for having pleadings not sworn to signed by the parties.

9. The question of discovery and exceptions to answer and the practice on such questions under existing statutes, rules and decisions is, to say the least, uncertain.

It seems to be settled that discovery by answer cannot be enforced since parties may be examined as witnesses, except in those cases where the statutes expressly give the right to discovery. If the present practice is to be retained upon this point at least one change should be made. All of the rules requiring or providing for proceedings in the circuit court commissioner's court or exceptions to answer should be abolished. And all questions arising on the pleadings and all questions of exceptions to answers praying for discovery should be heard by the circuit court in the first instance upon special application in each case.

It is submitted however that a better practice covering this

point would be to make one uniform rule in law and in equity cases, and for plaintiffs and defendants requiring parties to answer special interrogatories as to matters peculiarly within their knowledge, within a reasonable time after the filing and service of the same. Since parties are witnesses the reason for this practice is as strong in law as in equity cases. There are many cases where such relief is appropriate and it would not be difficult to provide a practice which would define the circumstances under which such interrogatories should be asked and answered, and a simple procedure for obtaining and filing the answers to such interrogtories.

Passing now from specific matters attention is called to two subjects of importance to the legal profession. One is a complete revision of the Michigan circuit court rules, and the other is a complete revision of the statutes of the state affecting circuit court practice. It is submitted that the circuit court rules should be revised, and that the chancery rules and law rules should be consolidated into one "Code of Circuit Court Rules," which should contain: First, those rules common to both law and chancery cases; second, rules applying specifically to law cases, and third, rules applying specifically to chancery eases.

Thorough revision of the circuit court rules would result in throwing out many obsolete rules and regulations and result in many incidental improvements in the practice. No revision of these rules has been made since 1858, and the necessity for such revision is too obvious for further remark. The law requires the supreme court to establish and revise these rules. If the statutes do not go far enough to provide for the editing, indexing and publishing of the rules they should be so amended as to make such provision.

Upon the question of statutory revision objections thereto are often stated. The constitution says: "No general revision of the laws shall hereafter be made." But this does not prohibit a special, thorough and complete revision of the law on particular subjects from time to time. There is nothing then in the constitution to prohibit the passage of a statute providing for the appointment of commissioners to examine the statutes relating to practice in the circuit court, and requiring such commissioners to prepare such bills for presentation to the legislature as are necessary to reform and amend such practice. Such bills would be acted upon by the legislature when presented, according to its

judgment. Each bill so prepared should be complete in itself and should conform to the constitutional requirement, that no bill should contain more than one object. If so drawn, any such bill, if passed, would revise, amend and consolidate the statutes on the subject named in its title, but if it failed would leave the practice standing as it is on the points in the proposed bill.

In the preparation and presentation of such bills the practice would be greatly amended and improved in many details not above enumerated. These bills thus prepared, would be prepared by competent hands, upon a survey of the subject and of all the statutes and rules on the subject of circuit practice. Each bill would be complete on a given subject and harmonius in its different provisions and harmonious with the other statutory provisions as to practice.

While extended argument and reasons for the foregoing propositions connot be given in the limits of this paper, it is submitted with great confidence that it presents reasonable and conservative methods by which our circuit court practice can be improved and reformed and calls attention to many specific points for such reform.

Bay City, Mich.

UNJUST CRITICISM OF COURTS AND JURIES.

E. E. OSBORN.

It is not wise for the bar to disregard or ignore the attacks made upon the judicial tribunals or their methods, whether such assaults originate from within or without the bar, if apparently made in good faith. A false statement persisted in is effectual to produce impressions upon many minds. We cannot safely treat with contemptuous silence the reiterated mis-statements which find currency in the literature and converse of the day. Too many give credence to these charges and the public opinion which constitutes the base of all reliance is formed by these considerations.

The object of this paper is to urge that the principal part of the belief entertained by some in the inefficiency or incapacity of the courts and the jurors is based upon false ideas as to the standards by which the work of their bodies is to be judged, or erroneous impressions as to the bodies themselves or the results obtained. The attacks are founded usually either upon the tedious and unnecessary delays which are assumed to attend the judicial administration of justice, upon the lack of abstract justice which they effect or the uncertainty of the result. The faults must of necessity be referred either to defects in the law itself or in the machinery by which it is administered.

The absence of any fundamental objection to the body of the law which should overturn it, need not be urged to you and it is not the object of this paper to contend that no change, either in the law or its procedure, would be beneficial. But as regards the operating machinery, it is believed that few assaults are directed at it that are not unreal and unsubstantial, based upon incorrect ideals. The problem, how to most satisfactorily and wisely dispense justice, finds as its necessary element the proposition that it can only be done through and by man. By no process can this factor be eliminated. But, in the consideration of this subject the theorist or fault finder omits altogether from his statement the personal equation of the machinery through which the work must of necessity be performed. He is inclined to postulate an intel-

lect infinite instead of finite to undertake the solution of the diverse and embarrassing problems with which courts and juries have to contend. But these bodies are composed of men who are not subjected to an entire change of their mental and physical constitution by their selection to the places they fill. They will remain men with all the faults, shortcomings and weaknesses of necessity attached to their condition. They are not machines incapable of error and fatigue if accurately adjusted and properly constructed. They can and do become sick, tired, exhausted or impatient.

At the bar we are not without faults in this same direction. One of our brethren is selected for a judicial office. We have known him as an honorable and upright man—for whatever charges are carelessly made against the bar and the bench, such charges do not embrace any slur upon the honor or honesty of the judiciary—but we have also known him as no more than average ability and judgment and possibly inclined to be indolent or hasty or careless in his practice. But the moment he assumes the bench we expect from him decisions as able as those of Marshall or Shaw, and that he will be industrious, calm, courteous, dignified and indefatigable. It is to the credit of the judges that they invariably endeavor to realize this ideal, but when they do not—and in the nature of things they cannot but fail in some respects—we are prone to unjustly and unfairly ridicule or condemn them for what is the result of their natural limitations solely, and thereby create unreasonable dissatisfaction with them and with the general administration of justice.

The composition of the jury is, however, more often the subject of invidious criticism. That body is assumed to be the incarnation of dullness, stupidity, inexperience and perhaps venality, whose decisions are based upon hazards or surmise or worse. But these are also men. They are the same men that are trusted with the entire government of affairs through the use of the ballot—indeed, in this state, as they are selected from the assessment rolls, if the possession of property is any indication of capacity, they belong to a class superior to the average voter. These are they who as mayors, aldermen and supervisors govern and control the municipalities and are considered competent to grapple with the innumerable questions which present themselves for decision to these governing bodies, and prudent, wise and honest enough to levy and disburse the vast sums which represent the public revenues.

No greater qualification, nor indeed, so great, is required of the men who fill the multitudinous offices through which the public is otherwise served. Men of no other capacity compose the legislature and create the statutes.

It is because a false standard is erected with which to compare the actions of the judges and the jurors, that inconsiderate criticism is developed. Their action will well bear comparison with that of any other body of men. As to integrity, the critic never accuses the courts, very rarely individual members of the jury, of corruption—while rumors of bribery of councils and legislatures are constantly current. As to expedition, all business is disposed of and if delay occurs it rarely is the fault of the tribunal itself, while the tardy action of congress, of the legislatures and of the governing bodies of private and municipal corporations in their disposition of public business and settlement of just claims is dnown beyond dispute. If they are accused in general terms of effecting injustice, the question, how the critic reaches so infallibly his decision, is pertinent. With what spark of the divine flame is his intellect illumined that he can safely venture to say that his judgment is right—that of the court or jury wrong. When he resorts to generalisms and talks of abstrat justice, he necessarily means only the correct result as it presents itself to his own mind. The courage which enables him to thus dismiss, with the curt statement that the decision is unjust, the determination of the tribunal which has deliberated upon and heard the case, is magnificent, but not necessarily conclusive. It cannot then be that if we are content to expect of judges and juries only such results as we expect of men generally, that any just cause for serious complaint arises.

When the attacks are made upon the jury system, *per se*, they are as a rule placed upon the ground either that the jury is not composed of proper constituent elements, or that after the selection it is not as competent to deal with different questions of fact and discriminate between conflicting and confused evidence as would be judges of experience. As regards the question of how the individual members of the jury shall be selected, there are many matters to be considered. The most unreasonable and unfair statements are not infrequently made in this connection. For example, a prominent author in discussing this subject, says: "Twelve men selected for their ignorance, are raked together from the body of the community, representing all trades and oc-

cupations, and in many cases no trade or occupation, and in this new and strange situation they are to pass upon the lives or fortunes of a fellow man. If we were not raised under this system and wedded to it, would anything seem more fantastic to us?"

This statement seems to imply that the ignorance mentioned is a general ignorance of all affairs and seems to further imply that to render a man a valuable assistant to the court in the capacity of a juror he must exercise some trade or occupation, both of which implications are groundless. It is believed in the court of no state is it required that there should exist in the mind of the proposed juror an absolute ignorance, even of the case in which he is about to perform his serious and solemn function and it certainly was not the meaning of the author to intend that those men who have by early diligence reached a position where it was no longer necessary for them to exercise any trade or occupation, should be excluded from jury service.

Indeed, the argument which runs through the entire article from which I have taken the foregoing extract seems to require that the jurors as selected should be the best men that can be found in the community. There can be no possible objection made to that manner of selection, but this makes it necessary to define what is meant by the best juror. It is apt to be the claim of those who would form a jury upon this basis, that the class of jurors that should be selected should be one of wealth, education and position—no precise limits being necessarily assigned.

This classification disregards two elements for consideration. The one, and the most important that the parties litigant may not all be of the class of which it is proposed to compose the jury, and that there may be among the poor and illiterate those who will of necessity resort to the courts and who should have the right to find there as their triers, men of the same class as themselves; men who are familiar with their feelings, with their thoughts, with their aspirations and with their beliefs, and who should consequently be the better fitted to act as their judges. But the assumption that by reason of special learning, wealth or position a citizen is better fitted for the office of a juror, is one which is not tenable upon any practical basis. If it be regarded as a question of theory, the ideal juror should be one who should have had special experience in the matter of weighing evidence, for this is the special advantage that is claimed for judges over jurors in the trial of issues of fact. But the possession of special

learning, the accumulation of wealth or the attaining of position either in office or in society does not depend upon the exercise of any such observation.

If the possession of this particular faculty be not made the criterion, then the degree of wealth, education and position becomes an embarrassing factor in the problem. In fact, however, experience justifies the statement that it is the man of good sense, ordinarily expressed as common sense, that possesses in the largest degree the desirable elements to constitute a good juror, and such a man is quite as often found among the average citizens as among those of other classes. Education is not based solely upon the learning acquired by the study of books and it is not uncommon to discover those who by their constant application to one science, have in a large measure lost, if not their common sense, at least a practical general knowledge of affairs.

The theory wnich lies back of the use of a jury for the decision of questions of fact, whether civil or criminal, rests upon the idea that the jury as constituted, shall contain representative elements of all the various classes of society, exclusive of the criminal, and that its decision when reached will represent fairly and practically the decision which the entire mass of people would reach had they heard the testimony in the same manner that it was exhibited to the jury. By this process, the determination of the jury brings the court into touch with the people and renders their decisions satisfactory to the people from whom they derive their power and influence.

When the complaint is made that the wealthy man or corporation does not receive at the hands of the jury the same consideration that the poor man does, one of the essential reasons for and conclusive proof of the necessity for the continuance of the existence of the jury, is brought to light. It was the jury in ancient times that stood between the overpowering influence of the monarch and his subservient judges, and the common people whom it was sought to crush. It is the boast of the courts that the poor man has received equal standing and equal opportunity with the rich, and if the juries err in extending to the poor suitor a sympathy and assistance which may at times exceed the bounds of strict propriety, they do nothing in this different from that the judges constantly do. It is an essential element of our nature that we should sympathize with and lean toward the side of the weaker man. It is this very action on the part of the juries that tends to

prevent overreaching and oppression on the part of the powerful to-day, as it did centuries ago and always has been and always will be the boast of the English speaking people.

It is wise in the composition of the jury that there should sit upon its panel the millionaire and the laborer side by side. By this association, by their junction in common consultation, they learn a respect for and confidence in each other, the benefits of which cannot be overestimated. But no system of administering the laws or of the laws themselves can be successful in a country organized upon the principles of this government and containing a population with the traditions and feelings that this nation contains unless such system is cordially approved and sustained by the mass of the people. The entire power of the court rests upon the undisturbed confidence of the people in its integrity and the even handed justice it dispenses.

To permit public opinion to doubt is to unnerve the arm of the court. The strength of the court lies in the unanimous public sentiment which sustains it, not in the coercive power of its officers. It will not do to place the justice dispensing power on a plane of lofty dignity apart from the common mass and rely upon terror as a means of enforcing obedience. Our people are not easily moved to fear, but they are to repose confidence. The citizen who knows that his neighbor has as a juror aided in the deliberations of the court is not readily led to believe that gross injustice or oppression has happened to any suitor.

Lord Justice Lindley said: "The reason why the English jurisprudence is so natural and moral is because the people have so much to do with the English courts." An eminent Swedish jurist once said in comparing the English jury with the naemd,? "Day by day, week by week I observed that the ruling idea of procedure was to have questions considered as the people with their feelings for real truth and for natural and effective justice would desire it."

Passing by the question of the composition of the jury, the next criticism is directed against its action. It is said that juries have certain tendencies in certain cases, that with a given case and given parties upon either side, the result can nearly always be anticipated. If this were so, it certainly would not render the jury obnoxious to the charge of being uncertain in its action. But, there is no greater certainty in this regard than there is in the action of the courts. Every practitioner recognizes certain tenden-

cies in certain judges or certain courts which are accepted as the law. Why, then, should not the action of the juries be as well accepted?

Our law is founded not alone upon statutes and judicial construction and decisions of the courts, but also upon customs adopted by the people themselves. By this process the people may as well make laws as their legislatures or courts. It is unfair to the jury to charge them with constant prejudice in connection with certain classes of cases unless we use the same language in connection with the courts. If, however, the courts by a constant succesion of decisions announce their allegiance to certain broad constructions of a statute, we characterize that merely as a liberal construction; if the court destroys the life of a statute by its opinions, we call that a strict construction. These views of the judges we accept as a part of the law and ground our opinions upon them, and there seems no good reason why the same doctrine, as noted in the constant decisions of the juries, should not also be accepted as a part of the law as formed by the people. For example, if a man has at some time thought of making a certain piece of land his homestead, we only regard it as a vagary of judicial interpretation to have it held that such thought on his part constitutes the land his veritable homestead. Why should we then captiously criticize a jury because in a case wherein the contesting parties are a woman upon the one side and a man upon the other, their verdict is almost always in favor of the woman?

It is the particular function of the jury to express rapidly and quickly the popular sentiment. We are not surprised to find that the law changes from time to time and grows in certain directions to conform to the requirements of a more complete civilization. When we discover this in the action of the courts we consider it wisdom, but the critic is apt to find in similar action on the part of the jury, matter which calls for condemnation. The principal ground for objection, however, is that the juries are said not to be able to properly weigh and consider evidence; and advantages are pointed out should the jury system be abolished and the court composed of a number of judges, not only in the greater experience which these judges would bring to the task of arriving at a correct solution of the controverted facts, but also it might be possible for them to take the evidence and read and study it.

As a practical question this is to every practitioner almost ludicrous. The decision of every hard contested case involving a

large number of witnesses whose testimony has been involved and contradictory, rests finally upon the atmosphere which has been created at and attends the trial and is easily discernible about the court room.

It is not required of the jury to place their decision solely upon any elucidation of the facts from the testimony of any particular witness, nor could the judges, if they were compelled to decide the case in the same manner, so do, but instead, there is created in the mind of the auditors a complete and perfect prepossession in favor of either one side or the other. The language of Mr. Justice Miller in giving the result of his wide and extended experience cannot be too often quoted in this connection. He said: "As a method of ascertaining the truth in regard to disputed questions of fact, a jury is in the main as valuable as an equal number of judges would be, or any less number; and I must say that in my experience in the conference room of the supreme court of the United States, which consists of nine judges, I have been surprised to find how readily those judges came to an agreement upon questions of law and how often they disagreed in regard to questions of fact which are apparently as clear as the law. I have noticed this so often and so much that I am willing to give the benefit of my observation on this subject to the public, that judges are not pre-eminently fitted over other men of good judgment in business affairs to decide upon mere questions of disputed fact."

Judge Dillon has lately said as the result of his own experience and observation: "Twelve good and lawful men are better judges of disputed facts than twelve learned judges." This is a matter which appeals to the judgment of each individual member of the bar, and it is believed that there is no one of extended experience who has not found that in the decision of questions of fact in equity the judges have been more prone to error in arriving at a correct result than would a jury. It is idle to say that the experience of the judge particularly fits him to decide intelligently between conflicting witnesses. Instead, he is withdrawn from among the class of those from whom the witnesses come, and has no particular facility above any other man of good judgment in determining their relative credibility. If a case rests upon the testimony of one witness on each side, each of whom is so far as may be known, equally credible, the judge invariably avoids the responsibility of attempting to say which tells the truth, because,

indeed, he cannot determine upon the facts before him which is to be believed—he rests his decision upon the ground that being equally credible, there is no preponderance on the side of the moving party and therefore renders his decree against him. This evasion of a decision which pretends to give justice but really admits the incompetency of the judge to arrive at the truth, relegates the trier of a cause to a position nearly parallel to that which obtains in Sweden and some other continental countries where all classes of evidence have certain fixed arbitrary values and the case is decided not upon what is believed to be true with reference to it, but because the evidence produced by either the one side or the other has a greater co-efficient.

The result of the decisions of appellate courts in equity cases will not show that the trial judges have been able to reach the same conclusion upon the facts which the superior court has gained, with such unvarying excellence as to commend that experience of trial judges to the favorable consideration of the people with a view to dispensing with the system of trial to which we have been habituated. In this connection it was said by Lord Brougham: "Trial by jury should be applied to those cases from which the practice in equity has excluded it and that improvement would be best effected by drawing back to it the cases which the courts of equity have taken from the common law and which they constantly evince their incapacity to deal with by sending issues to be tried whenever any difficulty occurs."

That judges at this day do not feel themselves particularly competent to cope with questions of fact is evinced by their constant tendency to require the assistance of a jury in suits at law wherever the law permits it, and it is to be noted that the more experience the judge has had upon the bench, the more apt he is to prefer the assistance of a jury in determining such vexed questions. And this is not alone because of a desire to escape responsibility, but also because of a knowledge of the difficulty experienced by him in discovering upon which side justice is to be found. The requirement that the mind of the juror should not be filled with a prejudgment of the case to be tried, is based upon sound reason and that principle should be extended as well to the judges themselves.

Is it contended that it would be just or fair in any sense to permit the trial judge to reach a determination which practically fixes his mind with reference to the result which should be

reached in a case to be tried before him, before he has heard the evidence? No wider exemption is expected of a jury and the practical administration of the rule really produces juries who are able to give to the decision of the case an intelligent and unbiased opinion.

And what is to be gained by a substitution of a bench of judges? As triers of the fact the judges are prone to be men of settled convictions upon very many topics and have not infrequently been selected for their positions by reason of their known predilection either toward the one political party or political belief or the other. The peculiar characteristics, the personal prejudices, the settled preconceptions of the various courts and its individual members are well known to practitioners; and the result upon a given set of facts may well be known to be one in one court and another in another, because of such prepossessions, and yet we do not criticise the courts so bitterly for entertaining such prejudgment, as we do the juries for precisely the same action.

It should be remembered that much of the idle abuse directed at the courts and their processes is but a repetition of the attacks made a century since and is now repeated by persons ignorant that most of the causes of reasonable complaint were long since removed. Much also is said by those unpracticed in the actual operation of litigation. In the nature of things, it is necessary that there should be a dispute before there can be a contested case, that each party thinks himself right and the other wrong, and that in many cases it should happen to be difficult to tell to which side the decision should be given. All this necessitates pleadings, opportunities to collect proof, introduction of proof, decision and review. The idea of the theorist as to rapidity and accuracy with which a controverted claim should be decided can only be attained when the character of mankind is so altered that each litigant will prefer that his opponent shall win and will assist in that amiable effort, but when this happens the unfortunate necessity which makes courts and lawsuits imperative, will have disappeared.

It is often remarked that the number of reversals in the courts of last resort is great compared with the number of affirmances. Here again our friends overlook the vast number of decisions of the *nisi prius* courts which are acquiesced in and that no case is as a rule removed to a higher court for review unless the counsel firmly believe that a reversal should and will follow such

action. But if much of the criticism to which reference has been made is inconsiderate and groundless, yet the courts and the bar are deserving of severe criticism for not acting to effect one change in the manner of jury trial in civil cases which has been advised by the most thoughtful and experienced writers and judges and is accepted as desirable by a vast majority of the bar. This is to dispense with the necessity for unanimity in these cases and permit a verdict to be rendered by a considerable majority, preferably nine, of the panel. It is believed that much of the fault-finding for which there is some excuse would disappear with this change and leave the general administration in as good form as can be devised under our institutions.

It should be borne in mind that our judicial processes are the result of slow growth and embody the present beliefs of the people whom they are to govern; that every change has been in the direction of improvement and has been cautiously made.

"Leges humanæ nascunt vivunt et moriuntur."

The extension of the power of the jury is modern. It indicates a growth in that direction which some think has accompanied a wider general education of the people and a feeling of distrust at the intrusion of the judges into matters with which the ordinary citizen felt as competent to cope.

It is not prudent or wise to attempt to ignore or override the popular sentiment, but it is wise to advise such alterations as will deprive the critics of their sharpest weapons.

Ishpeming, Mich.

NOTES.

CONSTITUTIONALITY OF "EIGHT HOUR DAY" LAWS.—The "eight hour day" law which was enacted some time ago in Nebraska has been declared unconstitutional by the supreme court of that state. The court base their decision upon two principal grounds, viz: (1) That the discrimination against domestic and farm laborers is special legislation; and (2) That the constitutional right of every citizen to contract as he pleases with reference to compensation is denied.

LAW REFORM.—The excellent article in this number by the Hon. Chester L. Collins, of Bay City, which was read at the recent meeting of the State Bar Association is commended to the careful reading of every thinking attorney in Michigan. The adoption of its several practical suggestions for the improvement of the circuit court practice would be a long step—several long steps in fact—in the right direction. It is to be hoped that the special committee of the State Bar Association to whom the recommendations were referred, will lose no time in bringing the matter before the attorneys and the people of the state at large, and that such a sentiment will be created in favor of it that the next legislature cannot do otherwise than to give it careful attention. If this is done, and before the adjournment a law making the needed reforms shall have been placed upon the statute-books, the members of the Bar Association may feel that its mission has been, in part, fulfilled.

HENRY A. CHANEY.—In the death of Henry A. Chaney the bar of Michigan loses one of its brightest members. As a law writer he was one of the very few from this state who have attained prominence. It is matter of regret that so few of Michigan's many talented and capable lawyers have taken any apparent interest in the literary work the opportunities for which the legal profession holds out. It is certainly not due to the lack of ability to do this kind of work that more of it has not been done. Because of this fact, however, attorneys who do embrace this opportunity, as Mr. Chaney did, will be all the more missed when they are called from their labors. He was truly a literary genius. His style was purely original, and everything he wrote for publication was admired because of the entertaining manner in which it was written.

The LAW JOURNAL is indebted to Mr. Chaney for many timely suggestions and words of encouragement when it was

passing through the crucial period of its existence, and endeavoring to secure its first foothold in the rough field of legal journalism. He was a contributor to our first volume, and his article on "Protection to Naturalized Citizens"[1] is one of the most interesting articles we have published.

INJUNCTION AS REMEDY FOR BOYCOTTS AND STRIKES.—Upon this topic Herbert S. Bullard, of the Yale law school, has contributed a short but interesting article to the *Yale Law Journal*.[2] More than a year ago[3] we called attention to the effectiveness and possibilities of the injunction as a means of settling strikes and boycotts. The two quite recent cases in which this somewhat unique remedy for this class of cases has been tried, have demonstrated its far-reaching power, and the promptness with which it can bring about the desired results. In the first case,[4] by the celebrated injunction granted by Judge Taft, the chief of the labor organization was compelled to recall his order commanding engineers to quit work, thereby coercing them into a refusal to handle the cars of a boycotted road, and the defendant roads were also compelled to handle the cars. In the second case,[5] Judge Jenkins went still further and issued an injunction restraining the executive officers of the various organizations of railway employes from ordering, recommending, advising or approving a strike, and restraining the employes from quitting the service, or in any other way preventing or hindering the operation of the road. In view of the present situation and outlook it will not be strange if the power of the federal courts is again brought into requisition.

LIABILITY OF DRAWER UPON A CERIFIED CHECK.—The supreme court of Ohio have rendered an interesting decision[6] defining fully the liability of drawers upon certified checks. The drawer of the check, before delivering it to the payee, had it certified as good by the bank upon which it was drawn. The payee presented it in due season for payment, which was refused, the bank having failed at the time of presentment. The record presented but one question before the supreme court, viz: Can the drawer of a certified check be held liable for its payment where it is certified by the bank at his own instance, request or procurement before he delivered it to the payee? To this Chief Justice Dickman replied, in part:

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[1] 1 Mich. Law Jour., 389.
[2] 3 Yale L. Jour., 211.
[3] See "A New and Effective Method of Settling Strikes and Boycotts," 2 Mich L. Jour., 133.
[4] T. AA. & N. M. R. R. v. Pa. Co., 54 Fed. Rep., 730.
[5] Farmer's Loan & Trust Co., v. N. P. R. R. Co., 60 Fed. Rep., 803.
[6] Cincinnati Oyster and Fish Co. v. National Lafayette Bank, 4 Alb. Law Jour., 440.

"The certification of the check by the bank as 'good,' procured by the drawee on his own motion, before its delivery to the payee, will not relieve the latter from the necessity of making due presentment and giving due notice of its dishonor, if he would hold on to the drawer; nor will such a certificate discharge the drawer where the bank becomes insolvent, if the payee uses the proper diligence in presenting the check for payment, and giving notice of its dishonor. In other words, where the drawer of the check delivers it already certified, the relations of the payee or holder and the drawer are not affected by the circumstance that the check is certified; their duties and obligations toward each other remain the same as they would have been had the check not been certified.

"Upon presentation of the check by the drawer to the bank for certification, it becomes manifest that it is designed to be negotiated, and that the drawer, to facilitate its negotiation, seeks to strengthen his own obligation by adding it to that of the bank. The certification becomes an acknowledgment by the bank that the drawer has funds on deposit, which the bank will pay over to the holder of the check upon its being presented. Assurance is thereby given to the payee that the check has not been drawn without provision to meet its payment. A check so certified when offered in taking up drafts, notes or other mercantile paper, if it is received too late to pass through the clearing-house on the day when offered, may inspire confidence that when presented the next day for payment it will not be dishonored. But such an enlargement of the security is not to be construed into an absolute discharge of the drawer of the check. By simply receiving the check in the form in which it is presented, the holder does not make the drawee his sole debtor, as when, after becoming the owner, the holder procures the certification of the check."

REFORM AND THE JURY QUESTION.—If the recent meeting of the Michigan State Bar Association did nothing more than increase the interest of the profession in the perplexing problem of how to cure the defects in the jury system, it served its purpose well. In this age of progress, all old institutions are subjected to the searching criticism of reformers and alleged reformers — chiefly the latter—and the dominion of the law has been entered as well as that of science, government, sociology and the rest. "Let us have change and improvement. Tear down the structure of antiquity and erect something adapted to the needs of the latter day civilization," is the demand of the reformers, and they are backed by an influential sentiment. Hobbies and crazy and visionary schemes of legislation are the rule of the day. The discontent and feverish restlessness among the masses that always accompanies financial disaster and commercial depression, is responsible for most of these. Men of sound ability and unquestioned

business sagacity seem to become mentally warped and temporarily deranged when they venture into the field of reform. An unfortunate sprinkling of the ignorance of foreigners, and of their crude and impracticable social schemes, has deepened this discontent.

Of all the alleged reformers those who seek to improve the methods of administering justice are the least troublesome and those who swarm the field of legistation the least visionary and dangerous. There can be not the least question but that there is room for improvement in the machinery of the law. In dealing with criminals, in settling disputes among men, and in regulating property rights, there is no more reason for adhering to the crude methods of early centuries than there is in cutting wood with sharpened stones, or worshipping according to the creeds and hollow ritual of the middle ages.

But even in effecting legal reform there is need of caution. It is a serius thing to force a positive change in present methods of administering the law and too wide publicity cannot be given to conservative words. For this reason we commend the paper read by Mr. E. E. Osborn, of Ishpeming, before the last annual meeting of the Michigan State Bar Association, and which appears in the present number of this journal, to the careful consideration of the profession. Addresses like this are needed to check the haste of radical reformers, and while there is much in Mr. Osborn's paper that does not accord with the proper spirit of progress and advancement in legal reform, yet it serves a most wholesome purpose in so far as it discourages hasty and ill-advised action. In short it is a discourse meant for visionary and impulsive and not for temperate and conservative legal reformers.

Mr. Osborn's vigorous protest against the too common practice of attacking, without reason or right, the present jury system and circulation of false representations concerning it will be fully endorsed by the good sense of every lawyer who reads his words. Whether the query is given a fair hearing depends entirely upon the lawyers who are most familiar with its workings, and it manifestly becomes the duty of the profession to see that laymen and the lay press are not led by mis-information to inconsiderately attack it.

The jury system is not perfect, and for that matter neither are the methods of judges. But it cannot any longger be denied that there are many and serious defects in the system of trial by jury and modifications of some sort, if not entire abolition, are imperatively demanded, and are inevitable despite the eloquence and earnestness of the defenders of the jury. Voicing the key-note of Mr. Osborn's address, in effecting the work let our moderation be known to all. Conservatism has many faults, but in dealing with a problem as far-reaching as this we should be conservative.

MEMORANDA CASES IN WHICH NO WRITTEN OPINIONS ARE FILED.

THE PEOPLE v. JACOB ASHER, Petitioner.

Habeas Corpus—Validity of Sentence.

Writ of *habeas corpus* is not the proper manner to review the validity of a sentence.

Heard on writ of habeas corpus to review the legality of the imprisonment of Jacob Asher in the State House of Correction and Reformatory at Ionia, upon a sentence that he pay a fine of five hundred dollars, and that on default thereof he be imprisoned in the State House of Correction until the same be paid, not exceeding one year, imposed by the circuit judge for the county of Eaton upon coviction of the crime of conspiracy.

L. H. McCall, Prosecuting Attorney, (*McPeek & Jones*, of counsel), for The People.

J. M. Powers and *Garry C. Fox*, for petitioner.

PER CURIAM. Petitioner remanded. This case is ruled by *Coffeen's Case*, 38 Mich., 311

GEORGE H. MASON v. HENRY L. PARTRICK.

Bond on Appeal—Judgment against Sureties.

On affirming a judgment of circuit court, judgment will be entered against sureties on appeal bond, as well as against the appellant.

Motion is made by the attorney for defendant and appellee to have judgment affirming the judgment of the circuit court for the county of Muskegon, in said cause, entered against the sureties, as well as against appellant, on the bond filed by appellant in removing said cause to this court.

Frank Joslyn, for motion.

Turner, Turner & Turner, contra.

PER CURIAM. Motion granted. Where a judgment for defendant has been affirmed on appeal the defendant and appellee is entitled to have the judgment entered against the sureties, on the bond filed by the appellant on removal of the cause, as well as against the appellant.

THE PEOPLE, *ex rel.* A. A. ELLIS, Attorney General, v. EDWIN A. BURLINGAME, Judge of the Superior Court of Grand Rapids.

Mandamus—Challenge to the Array of Jurors,

Mandamus is maintainable to review the decision of a lower court sustaining a challenge to the array of jurors.

Relator applied for mandamus to compel respondent to vacate the order sustaining a challenge to the array of jurors impanelled to try a criminal case in the superior court of Grand Rapids.

Respondent sustained the challenge upon the following grounds, viz:

1st. That the jury lists from several wards in Grand Rapids contained a less number of names than provided by law. (Howell's Statutes, § 6582.)

2nd. That the same list was returned from some of said wards, to both county clerk and city clerk.

3rd. That no list was filed from the 8th. ward of said city, with the city clerk.

4th. That different lists from the eleventh ward were filed in the office of the city clerk, from that filed in the office of the clerk of the superior court.

Alfred Wolcott, prosecuting attorney, for relator.
Nathan P. Allen, for respondent.

PER CURIAM. Writ granted. A writ of mandamus is maintainable to review the decision of the superior court of Grand Rapids sustaining a challenge to the array of jurors impanelled to try a criminal case.

IN THE MATTER OF STEPHEN WREZENSKI.

Admission to State Industrial School—Legality of Proceedings—Habeas Corpus.

Habeas corpus will not be granted to inquire into the cause of imprisonment in the State Industrial School because of alleged omission to report testimony taken on the trial to the probate judge, when the latter has duly certified to and approved the order.

Habeas corpus to inquire into the cause of the imprisonment of Frank Wrezenski in the State Industrial School for boys, under a sentence by a justice of the peace, alleged to be illegal upon the ground that the testimony taken upon the trial was not all reported to or considered by the probate judge who approved the proceedings. The certificate is as follows: "I do hereby certify, that I have carefully reviewed the proceedings and testimony in this case, and approve of the order therein made."

James Van Kleeck, for Petitioner.

PER CURIAM. Prisoner remanded. Where the probate judge has certified that he has reviewed the testimony and proceedings by which a boy has been sent to the State Industrial School, and approves of the order made therein, the court will not go behind the proceedings and grant a writ of *habeas corpus* to inquire into the cause of the imprisonment because of alleged irregularities in reporting the testimony to the probate judge.

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*THE RIGHT OF PRIVATE PROPERTY.**

WILLIAM H. TAFT.

As far back as we can go in the history of the common law of England, the right of property of the freeman was theoretically inviolate. Of course the serf or slave, owned by another, enjoyed no such right. But freedom, and the security of private property were linked together as the ancient liberties of the free English subject. The Norman kings were not as regardful of these liberties as they should have been, and the barons of the realm forced from King John in 1215 the written promise to preserve that which we all of us know as the Magna Charta. The important words of John's promise were: "No freeman shall be taken or imprisoned, or be disseised of his freehold or liberties, or free customs or be outlawed or exiled, or any otherwise damaged, nor will we pass upon him, nor send upon him but by lawful judgment of his peers or by the law of the land."

It is needless to say that this guarantee under John's sign manual was often broken by him and his successors, but just in proportion as England became more civililed, the ancient charter and pledge of rights became more sacred.

When our ancestors settled in this country their purpose was to establish here a government and society in which the liberty of the individual and the right of property should be strictly pro-

* An address delivered before the graduating class and alumni of the law department of the University of Michigan at the last Commencement. Judge Taft prefaced his address with the following remarks:

Gentlemen of the Graduating Class: Since your Dean and Faculty honored me with an invitation to speak to you on this occasion, I have not found it easy to select an appropriate subject of present interest. Last year, the class which preceded you, had the good fortune to hear an able and instructive address on the uses of the science of jurisprudence from one who, though still a young man, is a leading lawyer of the country and is now doing honor to your and his Alma Mater as the Solicitor General of the United States. A careful study of what Mr. Maxwell said in this place a year ago, and

tected. The constitutions of the states which were adopted after the Declaration of Independence and before the federal constitutional convention, contained guaranties, the language of which was borrowed from the foregoing clause of Magna Charta. The Massachusetts constitution of 1780, was especially full in this respect.

When the war of the revolution closed, the territory which lay northwest of the Ohio river and east of the Mississippi, was claimed, under royal grants, by Virginia, New York, Connecticut and Massachusetts. After much controversy these states ceded it all to the old Confederation, making it subject to the government of the Continental Congress, and that body, after several years of intermittent effort, finally passed the ordinance of 1787 establishing over it a territorial government. Its passage was secured largely through the persistent efforts of the Ohio Company, an unincorporated association of revolutionary officers of Massachusetts, organized for the purpose of buying and settling a million and a half acres of land in the new territory. The ordinance is in many respects as remarkable a charter of constitutional liberty as that under which we now live. All the guaranties contained in the Massachusetts constitution of 1780 were embodied in the ordinance, and it also contained a clause forever forbidding slavery in the territory. It was this which so endeared the ordinance to the opponents of slavery in the heated discussion of that institution in the forty years before the war. But the part of the ordinance with which we have most to do, in this discussion, is as follows:

Section 14. It is hereby ordained and declared by the authority aforesaid, that the following articles shall be considered as article of compact, between the original states and the people and states in said territory and forever remain unalterable unless by common consent, to-wit: * * * *

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the adoption of his suggestions to your methods of professional work, will make you better lawyers. I cannot hope to confer such a benefit upon you, but I have thought it might not be without public benefit, if I could say something to you, as future members of the legal profession, to awaken or increase your interest in the social conflict now at hand, in which is at stake the security of private property. I am the more encouraged to do so when I observe that among your professors and instructors is that great judge, jurist and law writer, Mr. Justice Cooley (who honors us all by presiding here to-day), than whom no one has done more in this generation on the bench and in his treatises to maintain inviolable the rights I am about to discuss.

ARTICLE II.

* * * * * No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land, and should the public exigencies make it necessary, for the common preservation to take any person's property or to demand his particular services, full compensation shall be made for the same. *And in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, bona fide, and without fraud previously formed.*

The authority and origin of the clause with reference to contracts is in dispute. Nathan Dane of Massachusetts many years afterwards, claimed that it was original with him, while Richard Henry Lee of Virginia maintained that he was its author, stating that he intended it as a regulation of the abuse of paper money. Whoever drafted the clause it is probable that it was prompted by Dr. Manasseh Cutler, the agent of the Ohio Company, who was deeply interested for his principal in establisning in the new territory, all the possible guaranties of property and contract rights, because upon such security depended the value and success of his company's proposed purchase. The clause forbidding the impairment of the obligation of contracts by legislative authority was the first restriction of the kind ever contained in a charter of constitutional rights. It suggested the adoption of a similar restriction in the constitution of the United States a few months later, and in some form or other is now found in the constitutions of nearly all the states.

In 1791, a bill of rights was added to the federal constitution and by its fifth article congress and the general government were forbidden to deprive any person of life, liberty or property without due process of law. Following Sir Edward Coke's statement in his Institutes, the supreme court of the United States has held that the words "due process of law" are the equivalent ot the words of Magna Charta "except by the lawful judgment of his peers or by the law of the land." In 1866, after the late civil war, and for the purpose of establishing the security of life and property, so much in peril in the states which had been devastated by war and which were being subjected to radical changes in their social conditions, the fourteenth amendment to the federal constitution was adopted, providing among other things. that no state

shall pass laws depriving any person of life, liberty or property without due process of law. Similar restrictions upon the power of state legislatures may be found in all the state constitutions.

There is not time and it is not necessary for me to review the judicial treatment and construction of these guaranties. Suffice it to say that the supreme court of the United States, the ultimate tribunal for the enforcement of them, has lacked neither in a high appreciation of their sacred character, nor in courage to declare void the intermittent attempts of state legislatures and of congress to override them.

I have thus reviewed the guaranties of private property contained in our fundamental law, familiar to us all, for the purpose of showing what a conservative government we live under and how strongly buttressed by written law is our American society against the attacks of anarchy, socialism and communism. While we inherited from our English ancestors the deep seated conviction that security of property and contract and liberty of the individual are indissolubly linked, as the main props of higher and progressive civilization, we have by our complicated form of government, with its many checks and balances, been able to give substantial guaranties of those rights, much further removed from the gusty and unthinking passions of temporary majorities, than has our mother country. The difficulties attending an amendment of the national constitution are so great as to make it practically impossible unless there is an overwhelming and long maintained feeling among the people in its favor. And this, in a less degree, is also true of amendments to state constitutions. Such limitations upon the power of the legislature were unknown when American political history began. The guaranties of English liberty and rights were against the aggressions of the monarch, not those of the legislature. The English parliament had always been omnipotent, and might by arbitrary act deprive the king of his throne, the subject of his property or the creditor of his debt. As Mr. Justice Mathews said in *Hurtado v. California*,[1] "The actual and practical security for English liberty rights of contract infringed by act of parliament. The Irish against legislative tyranny was the power of a free public opinion represented by the Commons."

The history of England even down to modern times affords many instances where property has been confiscated and vested

[1] 110 U. S., 531.

land laws of the last fifteen years, if subject to the restrictions of the federal constitution, would certainly have been held to be in direct conflict with all the guaranties of property and contract given in that instrument. The trend of recent English politics indicates that the power of public opinion is not now being strongly exerted in behalf of vested rights. The steps toward state socialism by both the great political parties are quite rapid.

The assaults of socialism upon the existing order in continental countries of Europe are more formidable even than in England, and of necessity therefore property rights are there more seriously threatened. The power of the socialist party in politics is in those countries fast increasing, and we need not be surprised if we shortly see in some one of them the experiment of socialism actually attempted, with the disastrous results and not altogether useless lessons which are sure to follow.

In this country until recent years not only have we had broad constitutional guaranties of property and contract rights, but there has been present in the breasts of our whole people a firm conviction of their sacred character. The fundamental compacts of state and nation have been merely declaratory of that which has been recognized as right and necessary by every individual, no matter how humble, and the immense advantage to our country growing out of the inviolability of property and contract rights has until recently been fully appreciated by all American citizens.

But while there has been no change in our constitutional guaranties, it cannot be denied that there has lately come a change of sentiment in certain of our people, by whom the right of private property is not now as highly regarded as formerly. Constitutional restrictions are generally not self executing but appropriate legislation must be passed for the purpose. Statute laws do not execute themselves, but, to be effective, must be administered by the firm hand of executive power. Events are happening each day which make a thoughtful man fear that if the tendency, indicated by them, is to grow in popular weight and intensity, our boasted constitutional guaranties of property rights will not be worth the parchment upon which they were originally written.

Impatience with the existing social order and contempt for the security of private property have found strongest expression among those who do manual labor for a living. By some of the more radical the wisdom of private property has been already challenged, while others manifest a resentment toward the system

without formulating a purpose to destroy it. Then there are others, not confined to the ranks of labor, who would not admit an intention to undermine the constitutional guaraties we have just been considering and yet publicly express so strong a hatred for aggregated capital, and show so marked a disposition to obstruct in every way its lawful accretions, that much comfort and strength is given to the avowed enemies of private property. Now the institution of private property is a good thing or it is not. We who believe in it must be able to give reasons for the faith that is in us. A full discussion of the subject would be too much extended for an address like this, but it may not be out of place briefly to refer to the origin of private property, and its incalculable advantage to our race, and to point out why the laborer of all members of modern society is most interested in maintaining its absolute security.

As soon as man raised himself above the level of the beasts, and began to live in a social state with his fellows, he recognized as a principle of natural justice that one should enjoy what his labor produced. As man's industry and self-restraint grew he produced by his labor not only enough for his immediate necessities but also a surplus which he saved to be used in aid of future labor. By this means the amount which each man's labor would produce was thereafter increased. As social justice requires that the laborer should enjoy his product, so it came to be equally well recognized that he whose savings from his own labor increased the product of another's labor was entitled to enjoy a share in the joint result, and in the fixing of their respective shares was the first agreement between labor and capital. What a man has the full right to enjoy he has the right to give to another to enjoy, and so it happened that when a man was about to die he assumed and was accorded the right to give, to those whom he wished to enjoy it, that which was his. As the natural parental instinct dictated provision for those whom he had brought into the world, it first became custom and then law that if he made no express disposition of what he had the right to enjoy, it should become the property of those for whose existence he was responsible. In this way the capital saved in one generation was received by succeeding generations, and its accumulation for producing purposes was made much more probable. The certainty that a man could enjoy as his own that which he produced, furnished the strongest motive for industry beyond what was merely necessary to obtain the

bare necessities of life. The knowledge that what he saved would enable him to increase and share the result of another's labor was the chief inducement to economy and self control, and this was greatly strengthened as a motive when he came to know that what he saved during his life could be enjoyed after his death by those to whom he was bound by natural affection. In other words, the institution of private property is what has led to the accumulation of capital in the world. Capital represents and measures the difference between the present condition of society and that which prevailed when men lived by what their hands would produce without implements or other means of increasing the result of their labor, that is, between the utter barbarism of prehistoric ages and modern civilization. Without it the whole world would still be groping in the darkness of the tribe or commune stage of civilization with alternating periods of starvation and plenty, and no happiness but of gorging unrestrained appetite. Capital increases the amount of production and reduces the cost in labor units of each unit of production. The cheaper the cost of production the less each one had to work to earn the absolute necessities of life and the more time he had to earn its comforts. As the material comforts increase the more possible becomes happiness and the greater the opportunity for the cultivation of the higher instincts of the human mind and soul.

Capital was first accumulated in implements, in arms and personal belongings, the value of which depended wholly on the labor necessary in their manufacture. The rewards of the chase were divided, the flesh being distributed to the tribe and the skin going to the hunter as his own. When the land began to be cultivated the crop belonged to the husbandman but the land was still common. Gradually, however, as more land was needed for the support of all, those in possession of the land asserted a right to permanently occupy it, and maintained it by force or were succeeded in permanent occupation by the stronger. After cycles of progress the ownership of land came to be recognized, and in course of time it was exchanged for what was purely the product of labor on the land. While, therefore, it may be conceded with reference to the land of England and the continent of Europe that private property in land in its rough uncultivated and unimproved state depended originally on mere force and conquest, nevertheless, in the possession of the present owners of it, its value is the accumulated result of the labor of previous generations. The

improvements and the increased value due to cultivation are manifestly nothing but the result of labor. This is still more clearly the case in our country, where land was originally given to those who would settle it, and where it only had value after the labor of clearing and cultivating it had been performed. All capital then is nothing but the accumulated savings from labor available for use in making labor more productive, and thus reducing the cost in labor units of producing everything conducive to human happiness. It would seem, therefore, to be plainly for the benefit of every one to increase the amount of capital in use in the world. This can only be done by maintaining the motive for its increase, which we have found to be in the institution of private property.

Labor needs capital to secure the best production, while capital needs labor in producing anything. The share of each laborer in the joint product is necessarily determined by the amount of capital in use as compared with the number of laborers. The more capital in use the higher is the reward of each laborer, while the less the capital in use, the number of laborers remaining the same, the lower the reward of each laborer. To state it in another way, the more capital in use the more work there is to do, and the more work there is to do the more laborers are needed. The greater the need for laborers the better their pay per man. Manifestly then it is to the interest of the laborer that capital should increase faster than the number of those who work. Everything which tends to legitimately increase the accumulation of wealth and its use for production will give each laborer a larger share of the joint result of capital and his labor. It will be observed that the laborer derives little or no benefit at all from wealth which is not used for production. Nothing is so likely to make wealth idle as insecurity of capital and property. It follows as a necessary conclusion that to destroy the guaranties of property is a direct blow at the interests of the working man.

The cry of the critic of our present civilization is that the poor are getting poorer and the rich richer, from which premise it is said to follow that the wealth of the rich is unjustly wrested from the poor. The proposition that the poor are getting poorer is unfounded and with that the conclusion falls. It is not true that the laborer of this country, skilled or unskilled in times of ordinary prosperity, receives less than formerly. On the contrary statistics show that the purchasing power of his wages is de-

cidedly greater than in former years. Doubtless there is much misery in the world but there always has been. There is a greater spirit of charity and benevolence to-day than ever before, and society is therefore more conscious of the misery of its unfortunates. But before it can be established that the present system of civilization resting on free labor, free right of contract and security of private property is a failure, it must at least be shown that the average condition of those who depend on manual labor for their existence is growing worse instead of better. This cannot be proved at all, and certainly is not shown by an array of statistics to prove that the rich men are growing richer.

The rapid accumulation of wealth among the comparatively few in the last twenty years in this country has frightened many people beside the laborer, but a careful consideration of the facts fails to disclose any good reason why it should, if the wealth is to be employed only for the lawful accretions of itself. In the last three decades we have witnessed an enormous decrease in the cost of producing nearly all the necessities and many of the comforts of life. This has been brought about in two ways, one by the invention of labor-saving machinery and processes, and the other by the combination and economic organization of capital. The inventors on the one hand, and the men of judgment, courage and executive ability who have conceived and executed the great enterprises on the other, have reaped princely profits, which the world may well accord them for the general good they have done. The profits which they received were the price the world paid for the gain in the purchasing power of labor. But for the pledge of society that the profits might be securely enjoyed the enterprises never would hare been undertaken, and the machines never would have been invented. The wealth thus accumulated is not wrested from labor but it is only a part of that which has been added to the general stock by the ingenuity, industry, judgment and ability of those who enjoy it. The other part has been enjoyed by every member of society whose labor has been given greater purchasing power. Moreover it is a mistake to suppose, because enormous profits have enured to the leaders of industrial enterprises, that their accumulation of it as private property will not benefit others. On the contrary, if the owner of such wealth would increase it, he must use it with labor, and so increase the dividend of labor and wages per man. If with the growth in the laboring population the condition of man is to improve, new plans

for the use of capital to better advantage must be devised which shall at the same time increase capital more rapidly than the population and reduce the cost of living. The aggregation and organization of capital in corporations is therefore for the general good. It is said that this has now gone on in some industrial enterprises called trusts to such an extent as to entirely destroy competition by absorbing all the small producing agencies. That this is one of the objects of the founders of such associations is doubtless true. Whether the intent and its accomplishment are unlawful by statute I do not stop to discuss. Certain it is that even a few years' experience with such unwieldy enterprises shows that those only are successful whose manngers are gradually reducing the prices of the commodities they manufacture, and this they cannot do and live save by reducing the cost of production. The competition of smaller establishments is only effectively avoided by continuously doing that which smaller establishments cannot do, that is, by producing and selling cheaper goods. The possibility that rival enterprises will spring up furnishes the same motive for reducing prices that actual competition would. The ultimate result of such aggregations of wealth is for the benefit of the man who buys what is produced, that is, of every member of society.

What has been said should not be misunderstood. The men who have by economic organization of capital at the same time increased the amount of the country's capital increased the demand and price for labor and reduced the cost of necessities, are not philanthropists in the sense that they have done this from any motive of unselfish and disinterested love for human kind. Their sole motive has been one of gain, and with the destruction of private property that motive would disppear and so would the progress of society. The very advantage to be derived from the security of private property in our civilization is that it turns the natural selfishness and desire for gain into the strongest motive for doing that without which the upward development of mankind would cease and retrogression would begin.

We are told in sounding rhetoric that some one by the present system of private property and contract is worth $50,000,000. Well, what of it? If he is using it in such a way that thousands of workmen are employed at good wages, and the cost of living necessities is being gradually reduced, what good ground of complaint has any one to make, that for the mere sake of seeing his

fortune grow, he is willing to give hard mental labor and untiring industry to the economic advancement of society? The men of wealth do not oppress anybody by extending, in every legitimate way, the scope of their great industrial enterprises and thereby increasing their wealth. The working man rarely has cause to complain, and his strikes are very few when production is profitably carried on. It is when the capitalist has not used good judgment in his investment when there are no profits to divide, that the real pinch between capital and labor comes, and then follows the usual result, after a weary conflict against the inevitable, that the investment is abandoned and the laborer is discharged.

But if it is so clearly for the benefit of the workingman that capital should be combined and organized to increase wealth and reduce the price of production, why is it that he and others are so hostile to aggregated capital? There are several reasons for this, one of which at least is founded on a real evil in part traceable to the increase of wealth. Unscrupulous managers of great corporate enterprises, with large amounts of money at command, have not hesitated to use it in corrupting legislative and other depositories of political power for the purpose of securing unjust advantages over the community at large. Unfortunately, men of good reputation who would not stoop so low in their private business, are, when interested in great corporations prone to wink at the dishonesty of such expenditures, and to regard them as necessary under the circumstances, stilling their consciencces by carefully avoiding embarrassing inquiry into details. The monopolies secured by legislation are much more dangerous to the public weal than any which may be for a short time maintained by the mere combination and organization of capital. The latter carry in themselves the germ which must shortly either render them beneficial to the community or cause their destruction, while the former supported by positive law are much more difficult for the natural operation of the principle of supply and demand is overcome. It is unfortunate for the public that there have been action and reaction in the matter of political corruption by corporations, which has only increased the sum of it all. While much money has doubtless been spent to secure undue advantages for corporate enterprises, it is also true that sums quite as large have been spent to prevent legislative or executive action unjustly obstructive to legitimate corporate purposes and instigated solely for blackmail. It is the corrupting influence of large corporations

which has caused a righteous resentment among the people against the abuses of corporate wealth, and often without any discriminating recognition of the immense amount of real good they have done for the community. Is it a good reason for destroying capital and the corporate agencies for legitimately increasing it, and the resulting addition to the sum of human happiness, that in the flush of rapidly acquired wealth men have been able to corrupt legislatures and other branches of the government? This would be a waste of benefits acquired equal to that described by Charles Lamb in his story of the Chinese method of preparing roast pig. Manifestly the remedy for the evil or corruption is to put men in political control not susceptible to corrupt influences, rather than to take away from everybody that, which, while it is a means of corruption, is also the means of securing every material good. The difficulties of eradicating corruption from politics are immense, but with our confidence still firm in a government of people we should be the last to admit that they are not to be overcome.

A second reason for the hostility of the laborer to the security of corporate wealth is in the want of clear-sighted leadership in many of those unions organized by workingmen for the purpose of securing their common production and benefit.

It is often stated that such organizations are a threat to modern society and civilization, but it seems to me that this is as far from the truth as the opinion that the aggregation and organization of capital are necessarily bad. We live in an age of marked progress in which organization of labor and organization of capital are necessary steps. They both of them make strongly for the public good but they also bring with them the evils that experience and time will cure. They are permanent and necessary features of our civilization and must be recognized and treated as such.

I have said that the increase of capital is for the benefit of the laborer, because it increases the demand for his labor and therefore his wages. As the fruits of production are to be divided between labor and capital, their common interest to increase the fruits is manifest. But in the division of their joint product their interests are plainly opposed. Clearly in such a conflict of interest the laborers united are stronger than when acting singly. Ultimately the division of the fruits is inexorably determined by the law of supply and demand, but during the gradual adjustment, according to that law, the capitalists will gain the advan-

tage unless labor acts as a body. On a rising market, early advantage in the increase of the demand for labor may be taken by the laborers if they act together, and a prompt raising of wages secured, when otherwise it would be grudgingly and slowly granted; while, by the same united action, they may retard their too eager employer in reducing wages on a falling market. Such organizations, when they are intelligently and conservatively conducted, do much I have no doubt to aid their members in the hard struggle for existence, and have materially increased the share of the workingman in the joint product of capital and labor. Take the Brotherhood of Locomotive Engineers in this country. It exercises a wholesome effect upon all the members by enforcing temperance, fidelity and strict attention in the discharge of their important duties, They have a prudently managed life insurance system. They take united action on the subject of wages. They call in experienced chief officers to assist them in a controversy. The result has been that their strikes have been few and their financial and moral condition excellent. There are many others like it and they conclusively demonstrate that the more conservative and reasonable such organizatians are in their dealings with employers, the more useful they are to their members.

But unfortunately for capital and labor, many unions as now conducted are very different from that just described. In them, the turbulent are either in the majority or by mere violence of demonstration overawe the conservative element. The leaders are selected, not because of of their clear judgment and intelligence, but because they are glib of tongue and intemperate of expression. The influx of foreign workmen bringing with them the socialistic ideas which prevail among the laboring classes of Europe, has planted in many unions the seeds of sedition and discontent with the existing order. Hence it is, that whenever a controversy arises between labor and capital resulting in a strike, lawlessness too often follows any attempt of the employer lawfully to continue his business. If this lawlessness is not repressed promptly and firmly, as often it is not, the sympathies of members of the union are awakened in behalf of lawless methods, their former law-abiding disposition is blunted and they manifest an alarming indifference to the necessity for peace and order.

Then many labor organizations appear in politics and their influence is thrown, regardless of party lines, for the candidate who loudly proclaims himself the friend of labor and proves it by

denouncing the greed of capital, the slavery of the workingman and his purpose to change all this by legislation. While their members are not in a majority, the united action of such labor organizations, together with the inert partisanship which gives to each of the great parties a certain vote whatever the issue, enables them to exercise an influence in elections far beyond their mere numbers. As there is still much human nature in man, the impulse of most persons in public life is to say and do nothing which will displease them. Thus it is that the workingman is rarely told the exact truth about his relations to capital and is too often encouraged by public men to believe that he suffers from society wrongs which should not be borne. Is it much cause for wonder, that he is skeptieal about the wisdom of private property, when he is told in the halls of our national legislature that he should have the right to compel another to employ him at his own price, and that, in a bloody battle waged for him, for this purpose, against private property and its defenders, he is entitled to sympathy? Is his illogical hostility to aggregate capital very strange when in the same place he frequently hears men attacked with virulence and a torrent of epithet, simply because by industry, thrift, executive ability and sound business judgment, they have succeeded in accumulating wealth? Shall we wonder that the labor unions regard themselves as privileged when it is deemed proper by a house of congress to investigate the action of an able and conscientious federal judge in making an order claimed to prejudice the interests of organized labor, on the ground that the order was illegal, and unwarranted? Whether the order was proper or within the jurisdiction of the court were questions of law upon which lawyers and judges might differ, and which would be probably settled by a court of appeals. There was not the slightest evidence that the learned judge's conclusion was influenced by other than a wish to do exact justice. He simply gave to the performance of a disagreeable duty his best judgment. May not labor unions reasonably conclude that such a disregard of the independence of a co-ordinate branch of the federal government is justified only because, in the cause of labor against capital, constitutional restrictions are not to be observed?

When we turn to the state governments, we find even more encouragement to the workingman to think that property has few rights which, in his organized union he is bound to respect. In several states the open sympathy of peace officers with law-

breaking strikers has been most demoralizing to the cause of order. The failure to visit the many breaches of the law with adequate penalties accustoms the less conservative labor unions to the use of lawless methods to accomplish their purposes, and the actual security of private property is seriously shaken.

I do not by any means intend to say that hostility to private property will continue to be the tendency of labor organizations for I am sure that, as their members become educated by hard economic experience to the truth that they have a deep interest in sustaining the security of property rights, their action will become more intelligent and more conservative. The trouble has been that many of their members are at present blinded by the new sense of social and political power which combination and organization have given them, and they fail to perceive the limitations of that power, which are fixed, not only by the inexorable law of economics, but also by the mighty force of Ameaican public opinion, which, after a long suffering patience, sometimes manifests itself with terrible emphasis.

The power which labor organization have, if directed in proper channels, could exert an influence for good which can hardly be overstated and all lovers of our county will say God speed the day. But it will not be by bringing about legislative or executive action or nonaction, which shall weaken the power of society to protect property and capital. Of the many good things labor organizatians could do in politics, let me mention but one. The use of wealth which injures labor is for the corruption of legislatures, national, state and municipal. This is most expeditiously and safely accomplished through the political boss. He lives by virtue of the spoils system and the machine. A concerted movement to abolish the use of public office to perpetuate political power would do much to deprive unscrupulous rich men of the means of manipulating legislatures, councils and city governments. It would bring about the payment of the same wages by the public as a private employer, and would relieve enterprises in whose success the workingman has every interest, of the heavy weight of taxation which so much interferes with their prosperity. It would give him cheap gas, cheap water, and cheap intramural transportation.

As it is, however, anything which injures corporate interests is thought in some mysterious way to work good for the laborer. The same spirit pervades many of the rural communities of this

country, and so it is popular openly to favor legislation hostile to corporate interests. The regulation of corporations, particularly railroad corporations, has been so severe and unjust in many instances that insolvency has followed and thereafter has come a poor or indifferent service to the public, because the purchaser will not expend further capital within a jurisdiction so inimical to enterprise. Many state legislatures are now engaged in devising plans of taxation which shall affect only corporate property and remove the necessity of increasing the rate of general taxation in order to pay the increased expenditures of government. Thus they are discouraging the large investment of capital within their jurisdiction and directly injuring those of their constituents who earn their daily bread by the sweat of their brows. When the populist party came into control of the state government of Kansas with its threatenings against capital and corporations, all capital in movable form fled the state as if from a pestilence and it became apparent how little civilization could improve without capital.

The populist party has grown enormously among the farming communitins of the south and far west because of the discontent produced by the present industrial depression. There were in times of prosperity on the one hand an extension of areas of agriculture beyond the limit of profitable cultivation, and on the other the planting of new territory enormously fertile, which made living competition with it by older farms impossible. The hardships and consequent discontent have led to the approval by the populists of those quack remedies for hard times that are so fascinating to the human imagination and so pernicious in their effects. They are based principally on the proposition that the government is all powerful to give every one a living because it has an inexhaustible supply of wealth to draw from, that it can create wealth by stamping as money what was before worthless, and that it is its duty to distribute it when so created, among the people. They forget that the state is nothing but an aggregation of many men, and that it cannot use a cent which it does not take from the men who compose it. They seek to avoid the simple truth that there is nothing good to be enjoyed for which labor has not been expended. From one fallacy they have drifted to others, until the difference between what is advocated in populist platforms and socialism is hard to state. Suffice it to say that many of the planks are directed against accumulated capital and the rights of private property.

In the large cities where foreign labor is congested, we find bodies of avowed socialists. The socialist objects to the ownership by an individual of any means of production, that is, of capital. That, he contends, should be wholly vested in the state, while the results of production should be distributed among all members of society for consumption only, in proportion to their labor, the comparative value of the labor of each to be fixed by a governing committee. It is hardly necessary to point out the immense loss in production which such a plan would entail in depriving the community of the benefit it now derives from the motive for accumulation given by the security of private ownership, or the entirely impracticable plan of governing committees to determine the comparative rewards of different kinds of labor, or the waste and corruption necessarily incident to state managed enterprises.

In addition to those already named who are engaged in a movement against the security of private property, there are others who look on with complacency at the popular resentment at large corporate interests, but would be much alarmed at any disposition to infringe upon the property rights of individuals of moderate means. They would be willing to see a man's power of accumulation limited by law to a substantial size. What shall the sum be? Shall it be a million or a hundred thousand or fifty thousand or less? In either case such a limitation would be a fatal blow at the institution of private property and its beneficent effect. The right of property and the inviolability of contracts carry with them, by necessary implication, the right to use property as capital for the lawful accretion of the same, and if the right to limit lawful accretions be once conceded and inequalities of wealth are to be remedied by legislation, there is no logical stopping place between that and practical socialism.

It seems to me that enough has been stated to show that, while we have the strongest guaranties of the rights of property in our fundamental laws, there is a growing tendency to weaken the firm maintenance of those guaranties, so far at least as they relate to corporate capital; that everything which weakens this security of corporate capital cannot but affect that of individual private property; and that if the present movement against corporate capital is not met and fought, it will become a danger to our whole social fabric. I do not think the present state of social unrest is any ground for a pessimistic view of modern civ-

ilization. We are passing through an era of tremendous economic changes and the apparently alarming phenomena in the social horizon are only the necessary results of an adjustment to new conditions. But this view does not, in the slightest degree, diminish the necessity for reducing the friction of the adjustment, so that it may not be retarded, or for preventing a temporary impairment or destruction of the chief agent in the material progress of the human race, the security of private property and free contract.

How then can we stay the movement I have described against property rights? It is by telling and enforcing the truth that every laborer, and every man of moderate means has as much interest to preserve the inviolability of corporate property as he has that of his own. It is by defending modern civilization and the existing order against the assaults of raving fanatics, emotional and misdirected philanthropists, and blatant demagogues. It is by purifying politics from corruption. It is by calling to strict account our public men for utterances or conduct likely to encouage resentment against the guaranties of law, order and property and by insisting that equal and exact justice shall be done ns well to a corporation as to an individual in legislative and executive action. The friends and believers in our modern civilization with its security for private property, as the best mode of a gradual elevation of the race, must make their views and voices heard above the resounding din of anarchy, socialism, populism and the general demagogy which is so wide spread to-day.

In the days of old, the charter guarantees were given it was supposed, for the benefit of the poor and lowly against the oppressions of the rich and poweful. To-day it is the rich who seek the protection of the courts for the enforcement of those guaranties. The judges of federal and other courts are sworn to administer justice fairly between the rich and poor. When the oath was formulated it was doubtless feared that the temptation would be to favor the rich. To-day, if a judge would yield to the easy course, he would lean against the wealthy and favor the many. While this seems to be a change, it is not really so. The sovereign to-day is the people, or the majority of the people. The poor are the majority. The appeal of the rich to the constitution and courts for protection is still an appeal by the weak against the unjust aggressions of the strong. Mr. Justice Miller, speak-

ing for the supreme court in *Loan Association v. Topeka*,[2] a case where the majority of the voters of a city were seeking to impose upon its property holders against their consent, a tax to build a private factory for the use and ownership of a private individual, uses this language in reference to the right of the property owner to object to the taxing of his property for the personal advancement of another. "It must be conceded that there are such rights in every free government beyond the control of the state. A government whigh recognized no such rights, which held the lives, liberty and property of its citizens, subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power is, after all, a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism."

The immediate burden of this conflict for the security of private property will, I suppose, fall upon the courts until by discussion and longer experience, light shall come to its opponents. The bench must rest for its strength upon the bar. As Judge Dillon said in his address as president of the American Bar Association: "The prominent present duty of the American bar and judiciary is to maintain the ascendency of our constitutions and to see that their guarranties are made effectual in favor of all persons, all rights and all interests which they were devised and designed to protect."

And for this reason I have addressed you. As you enter upon your professional life you will be required to swear that you will support and defend the constitution of the United States and of the state of Michigan. Many of you will become foremost in the communities where you live as leaders of public sentiment. Many of you, I hope, will take part in politics. You will go to the legislature and to congress. As public teachers, as public men, as politicians, you will not cease to be lawyers, or lose your allegiance to the fundamental compacts you have sworn to uphold and defend. It has seemed to me fitting, at such a time, to remind you that in those compacts there is secured as sacred the right of private property, and that unless you do everything that in you lies to maintain that security and guaranty, you will be false to the oath you take. You are about to enter a profession which a great French chancellor said was "as old as the magistrate, as noble as virtue, as necessary as justice." In ancient times the members of that profession were the bulwark of freedom and of the vested rights of property. I do not doubt that they will continue to be so in the future. The freedom of the citizen is secure. It is the right of private property that now needs supporters and protectors.

[2] 20 Wall., 655.

NOTES.

YOUNG LAWYERS IN THE U. S. SUPREME COURT.—The *American Lawyer*, in a recent issue, says:[1] Chief Justice Fuller, in a recent interview, mentioned, as one of the marked phases of modern legal practice, the fact that cases of the gravest importance are often argued before the federal supreme court by young lawyers. It is cheering to learn that the old habit of calling only the veterans of the bar to present cases and argue briefs that were almost invariably prepared by some younger practitioner, is passing away. This innovation of the younger generation of lawyers arguing their own cases is bound to continue until it shall become the recognized custom.

LAW AND POLITICS.—Possibly every young lawyer, as he enters into the active practice of his profession, has received more or less sage advice as to the advisability of "dabbling in politics." Students at the law chools may almost invariably be heard to comment upon the wide differences of opinion entertained by their instructors. As they gather for their farewell lecture, or annual address, how they will be advised upon this subject is always matter of conjecture. The utterances of two well known men made at the same time before the two law schools of this state would make an interesting parallel column. In his address delivered before the law students and alumni of the University of Michigan, published in this number, Judge Taft strongly urged his hearers to take part in politics. At the same time in delivering a similar address before the Detroit College of Law, the Hon. Don M. Dickinson emphatically advised young lawyers to keep out of politics.

ABOLISHMENT OF DAYS OF GRACE.—That the spirit of legal reform is getting a firmer hold upon the minds of lawyers and law-makers, is manifest by the relegation, every now and then, of some old relic of past ages, which has nothing but age to commend it. To the credit of the state of New York be it said, that it contains the most active and progressive bar association in the country. Better than this, the association is supported by law-makers of the same type. What has been done in that state along the line of law reform, and in raising the standard of legal education and requirements for admission to the bar, may well be

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1 2 Amer. Lawyer, 230.

emulated by the bar associations and legislatures of the other states. Their latest accomplishment in the work of legal reform is the abolishment of days of grace. By an act passed by the last legislature, and approved by the governor May 10, days of grace are abolished in that state on all notes, drafts, checks, acceptances, bills of exchange, bonds, or other evidences of indebtedness. The act is to go into effect January 1, 1895. This reform is not to be considered so radical, however, as it would be in almost any other state. For many years this scion of the common law has been recognized with more or less disfavor and many limitations have been placed upon it. Since 1857 bills and notes payable at sight have not been entitled to days of grace, neither have checks or bills of exchange or drafts drawn at or after sight on banks.[1]

The allowing of days of grace came from an old common law custom, which long usage transformed into a law. It is supported by sentiment only, and should give way, with other useless relics, to the demands of modern advancement.

ADMISSION TO THE BAR.—Early in the year Judge Fraser, of the Wayne county circuit, appointed a committee to examine applicants for admission to the bar. Among those who presented themselves before the committee for examination was a young man, Mr. Penniman, who, it was alleged, had been studying law in an office for several years. The committee, not deeming him sufficiently qualified, refused to grant him a certificate, and the petition of Penniman was carried to the supreme court. This court finally granted the petition, and now Mr. Penniman is an officer of the court, with all the rights and responsibilities incident thereto. This incident illustrates the tendency of examining boards to guard with greater care admission to the bar, and we take this occasion to congratulare Mr. C. K. Latham and his colleagues on the committee for the Wayne circuit. A few unworthy members are a great load for the profession to carry, for they, more than anything else, help to lower the generally high standing of the bar. We make no particular point against Mr. Penniman, but take advantage of his difficulty to call attention to a tendency in the right direction.

NATION vs. STATE.—The great strike of the American Railway Union, while it failed to accomplish any of the objects for which the men went out, taught one lesson in federal supremacy which the American people had never thoroughly understood. Gov. Altgeld, and the strikers generally, relied upon Sec. 4, Art. IV of the constitution of the United States, which guaratees to

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[1] Rev. St., 2503.

every state a republican form of government, and protection against invasion, "and on applicarion of the legislature, or the executive, (when the legislature cannot be convened), against domestic violence." None of the state legislatures were in session, and, principally for political reasons, the state executive refused to call upon the United States government for assistance. One of the enumerated powers given by the constitution to congress was power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions." Moreover, clause 3 of the some section of the constitution gives congress the right to regulate commerce among the several states, and the 18th clause gives congress the power to make all "laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the constitution in the government of the United States, or in any departments or offices thereof." The powers thus given by the constitution, according to the interpretation of the supreme court, confer ample authority upon the president to deal with such gigantic manifestations of lawlessness. Of all forms of government a republic is least able to suppress internal disorder. Against a foreign foe the United States is one nation, but the complexity of our system of sovereign states within a sovereign Union oftentimes causes an overlaping of state and federal jurisdiction. President Cleveland has acted under the constitution, and south as well as north his example has been applauded. Citizens now realize that it means something to be a citizen of the United States, and that the security of property does not depend upon the whim of a governor elected by the mob which seeks to ignore all laws. The executive of a state may call upon the United States government for assistance; but the federal government is not restrained from interfering merely because he has not been appealed to by the governor or state legislature.

When people learn that the government governs, and that right will be enforced, strikes will be fewer, and discontent and unrest will become less, because of the limitations set by law and justice.

OBITUARY.

CHAUNCEY W. WISNER.

The death of the Hon. Chauncey W. Wisner, which occurred at his home in the township of Bridgeport—not far from the city of Saginaw—on the 19th ult., removes from the activities of life one of the pioneers of this state, and a person who left an impress behind him.

He was born in Mt. Morris, Livingston county, New York, April 26, 1835. In 1848 he came to Michigan, locating at Flint, and ever since that time he resided in either Genessee or Saginaw county. The family of Wisners for generations past were wont to produce lawyers, and true to the instincts of the family, deceased first chose the profession of the law for an occupation. In 1860, after his admittance to the bar, he was elected prosecuting attorney for Genessee county. After his term of office expired, in 1863, he removed to East Saginaw, and continued the practice of his profession until 1877, when he abandoned the practice of the law and removed to the farm upon which he lived at the time of his death. While living at East Saginaw, and before the uniting of the two cities East and West Saginaw, he was elected mayor of the former city. He served the township of Bridgeport two terms as supervisor, and was a member of the state senate for the three consecutive terms of 1887, 1889 and 1891, and in the legislature of 1893 he was a member of the house of representatives.

Mr. Wisner was a person of marked personal characteristics, and one who had a wide acquaintance in the state. He was peculiarly gifted in a felicitous and strong manner of putting his thoughts before his listeners, either in private conversation or in public addresses. He had a quick and accurate conception of the character of men and measures, and a strong analytical mind which served him well as a legislator, and made him an efficient member on committee work, and especially so on the judiciary committee of which he was the chairman in the session of 1891. He was possessed of a genial disposition, with a happy faculty of distributing his geniality among his listeners; and, always able to create a laugh, he was an enemy to the income of a doctor. He had the reputation of being a wit, but this led him to be greatly misunderstood by those who did not know him intimately, as there was a deep under-tow of viril thought and strong conviction in his nature, which did not appear to those who met him casually.

In many respects Chauncey W. Wisner was a unique character, yet the more intimate the acquaintance with him was the better did that character in its entirety appear. Nature did much for him, and used some of her best material in his creation.

Mark M. Powers.

MEMORANDA CASES IN WHICH NO WRITTEN OPINIONS ARE FILED.

GOEBEL BREWING COMPANY v. GEORGE S. HOSMER, Circuit Judge.

(June 28, 1894.)

Certiorari—Notice of Intention to Apply for Writ.

It is essential that notice of intention to apply for a writ of certiorari be served upon a justice of the peace within the time prescribed by law, and when it does not so appear mandamus will issue to compel the circuit judge to set aside an order refusing to dismiss the writ.

Judgment was rendered in justice court of the county of Wayne in favor of the Goebel Brewing Company, whereupon the cause was removed to the circuit court by writ of certiorari. Application by relator to compel the circuit judge to show cause why writ of mandamus should not issue commanding him to set aside an order refusing to dismiss writ of certiorari. Ground assigned was that no notice of intention to apply for writ of certiorari was served upon the justice of the peace within the time prescribed by law.

Ralph Phelps, Jr. and *W. B. Jackson*, for relator.
W. E. Walsh, for respondent.
PER CURIAM. Writ granted.

VILLAGE OF VICKSBURG v. EDWARD S. BRIGGS.

(June 28, 1894.)

Writ of Error—Neglect to Prosecute—Motion to Dismiss.

A motion to dismiss a writ of error will not be granted because of the mere neglect or failure to prosecute.

Motion by plaintiff, the village of Vicksburg, for an order dismissing the writ of error issued in the above entitled cause, a case commenced by warrant for violation of ordinance number nine of said village on June 5, 1892. Reason assigned is that the appellant, Edward S. Briggs, had neglected and failed to prosecute said writ of error.

J. R. Cropsey, for motion.
J. H. Kinnane, contra.
PER CURIAM. Motion denied.

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*THE LAWYER AS A TEACHER AND A LEADER.**

THOMAS M. COOLEY.

An important feature in the history of the last twelve months to which I shall now call attention will seem still further to emphasize the importance of the lawyer recognizing his true position in the political society as a teacher and leader, and his duty to support the constitution and the laws by making them known in their true import when the opportunity to do so is distinctly presented and the need obvious, and by impressing upon the minds of unthinking people the vital truth that liberty is born of law and not of license.

During the summer just past the country has witnessed a great and disastrous boycott and strike of railroad workmen. The cause was not any controversy over their own wages, or about their treatment by their employers; it was a sympathetic movement, so-called, and the reason assigned was that laborers for a corporation with which some of the railroads had important dealings had gone upon strike rather than accept the wages offered them; it began with a boycott against railroad companies who made use of the cars of the corporation aimed at and who would not discontinue the use, this being followed by a general strike, the avowed purpose of which was, by blocking the wheels of traffic, to coerce the railroad companies into taking such action as would compel the corporation complained of to submit to arbitration the charges of oppression its employes brought against it. The strike was professedly peaceful, and the thought in the minds of the leaders appeared to be that by the men leaving the

*A portion of the President's Address read before the American Bar Association, at the 17th annual meeting, at Saratoga Springs, Wednesday, Aug. 22. The part here given is the concluding portion of the address, and refers particularly to the recent labor troubles.

railroad service and enforcing a boycott against such of the railroad companies as continued to have dealings with the offending corporation and against the use of its cars, all the companies would be so completely crippled that they could no longer run their trains, and must of necessity accept the terms dictated to them.

The case was in some particulars without precedent. Its leading peculiarities were the following:

First.—The railroad companies had no means of coercing the offending corporation to submit to arbitration the controversy with its workmen; they could at most only refuse to carry out certain existing contracts with it, and discriminate against it when called upon to act for it as common carriers; but either of these courses would be unlawful, and must subject them to damages and to the compulsory process of the courts. The companies struck at were therefore required to put themselves in distinct opposition not only to certain contract obligations before entered into by them and perfectly legal when made, but to the law itself, so that by yielding they would naturally expect legal penalties to follow. But refusal to submit must inevitably result in great loss to the companies, for their receipts would be largely reduced, since the commerce of the country, in so far as it was in their charge, would be paralyzed in exact proportion as the strike succeeded in its aims. Meantime the offending corporation would be comparatively unharmed, perhaps not harmed at all.

Second.—But if the strike was intended to be a peaceful one, it was soon seen that the burden of the loss was to fall not even upon the railroad companies, but upon the public who had occasion to make use of their services. This would be, as was soon shown, a necessary result of the stoppage of railroad trains. Great numbers of passengers were soon side-tracked at way stations, at some of which it was with difficulty they procured the means of subsistence; shippers of property were put to great loss by delays, and immense quantities of perishable freight were soon going to ruin on trains which the railroad managers were unable to take to their destination. California had tropical fruits by the train load; dressed meat in similar quantities, even live cattle and horses, all belonging to private parties, were thus given to destruction by the sun and by the hot winds. The suffering of innocent persons as a necessary result of what had been

ordered was quite beyond estimate; the victims were found in every part of the country and among all classes of people.

Third.—But though it was thought that the strike should be peaceful, and the strikers in emphatic terms were admonished by their leaders to make it so, its leading characteristic almost immediately came to be violence. This was unavoidable. For the time being it aimed to paralyze transportation and all commerce by rail, and the greater the consequent injury and inconvenience the greater would be the probability of success. Lawless classes who professed to be sympathizers, but cared only for disorder, saw this very plainly, and the situation soon took on some of the features of civil war. A difficulty the leaders hoped would not be encountered it was soon discovered was likely to prove insur mountable. Laborers out of employment were now abundant; they would covet the vacant places, and unless appeals made to them to stand with their fellow-laborers in what was assumed to be the common interest of labor should prove successful, they must by some other means be kept from the railroad service or the strike would fail. But the needs of the unemployed and their families were too urgent to admit of their listening to solicitations; they came forward in considerable numbers for employment, and violence, of which they were the victims, followed. The ordinary peace authorities proved unable to protect them; the general fact was that the worst elements of society were soon in possession of some towns and especially of some sections of Chicago, and not only were men anxious to perform labor upon the railroads assaulted and beaten, but the torch was applied to railroad equipment and buildings, and great destruction resulted. The leaders who were directing the strike, however anxious they may have been to avoid breaches of the peace, were powerless to calm the passions that had been aroused, and the civil commotion went on increasing from day to day in magnitude.

Fourth.—One question fairly arising upon the circumstances of this strike and which, so far as I know has hitherto received no attention, I think I may properly call to your attention here. It concerns the rights, legal and equitable, of those who were to be affected by the strike, should one be declared, and raise the question whether under principles supposed to prevail wherever free government exists, the strike as against them could be fully justified without careful consideration of its probable effect upon their interests being first had, and if practicable an opportunity

given them to urge reasons from their own standpoint against its being entered upon. The parties who were to be injuriously affected were, *first*, the railroad companies, who, if they were allowed to be heard through their general managers or any authorized committee on the question whether it would be just or reasonable to declare a strike against them for what was not their own fault, might possibly have convinced the members of the order which was then considering the question that the objections to it from the standpoint of their employers were altogether reasonable; *second*, the government of the United States whose transportation of the mails and control over interstate commerce were to be very seriously interfered with, and perhaps the service of federal process obstructed; and *third*, the people of the United States, whose legal right to be transported and to have their property carried by rail was to be in part and perhaps wholly taken away while the strike continued, at a cost to them which in all probability must in the end be counted by millions. The public it would seem might have been allowed a hearing through business organizations, such as boards of trade, or through bodies like the Farmers' Alliance, and the government had even a still stronger claim to a hearing, for it was the government of the strikers themselves, and the action which was interfered with was action of which they in common with all the people of the United States enjoyed the benefit. And the government might have pointed out that if the performance of its constitutional functions was hampered now in an attempt for one assigned reason to compel the railroad companies to take particular action, it might possibly on some future occasion, for reasons still less forcible, be rendered impossible. Success in one instance would not only strengthen those who might have in view similar action in the future, but it would indirectly aid them also, by diminishing the courage of resistance. But the government might also have pointed out that the declaration of such a strike would be the exercise of unchecked and arbitrary power, which where liberty prevails is never by law provided for, since a free people would justly pronounce it unendurable tyranny, and the strikers themselves would as citizens never consent to be governed by a law which would admit of it. A free government is expected to submit even the most unimportant question of legal right to the adjudication of some impartial tribunal, to make provision for the hearing of interested parties, and to take precautions that the

elements of passion and prejudice shall not be suffered to control the decision.

Here were three parties, all innocent as regards the grievance which was in question, who, if the action was to be taken after the manner deemed necessary to prevent injustice in governmental proceedings, would seem to have had a strong equitable and indeed an indefeasible right to have the effect upon themselves first considered. Now, I understand very well that in the case of the ordinary strike or boycott entered upon for the purpose of redressing an existing wrong or to prevent one which is threatened, the case is to a considerable extent different. Such a case partakes of the nature of self-defense, and incidental injury to third parties, if it is unavoidable, is excused on that ground. But there was nothing in the nature of self-defense here. It was a third party who was supposed to have been wronged in this instance, and as innocent parties were to be directly struck at and greatly injured, the very least they could justly be awarded would be a careful consideration, by those proposing the damaging action, of the question whether the necessary consequence, even if they were successful in what they hoped to accomplish, must not be to cause injury to innocent parties greatly in excess of the gains, and if so whether the proposal could in justice be accepted. But this was a question of which no notice was taken. Innocent parties who must necessarily suffer not only had no opportunity to protest, but their losses were not taken into account as reasons against the boycott and strike. On the contrary they were looked upon as favorable features of the case, since they rendered success more probable. But a sympathetic strike is bad in morals and must be quite as bad in policy, when the probable injury to innocent parties will exceed the probable benefit to the parties it aims to assist.

The facts here stated seem to emphasize the importance of giving some thought to another feature of the case which perhaps is common when the question of a considerable body of men throwing up their employment is brought by their officers before them, but was particularly prominent here. It concerns the manner in which the decision upon the question is reached. In theory, the order to throw up the service is always suppose to be authorized or adopted by the men called out, and to be based upon substantial reasou. In this case the reason assigned was that the obnoxious corporation refused to submit the case made by its laborers

to arbitration, which was a wrong the railroad men desired to remedy. But as their own employes could not compel the arbitration, and there were legal difficulties in the way of their taking the steps the men demanded, it would seem that the substantial reason for proceeding in a hostile way against them must in this instance have been wanting. An impression that such was the case must to some extent have existed among the men who were ordered to strike, for it seemed necessary to call meetings and to have them addressed by speakers who would urge what the leaders proposed. The methods whereby at these meetings an affirmative vote is secured are worthy of attention, especially by laborers themselves who by reason of society ties are liable at any time to be drawn into similar controversies. They are most deeply concerned of all, since the vote to be taken may affect their interests for years, perhaps for life.

The orders in which laborers unite are supposed to be self-governing, and the principles which apply to the action of municipal bodies, and which have become established because they conduce to justice, are applicable to them as well. To be wisely or even safely governed, their members must proceed deliberately, and the action taken must be the result of their best judgment coolly and dispassionately applied. In the legislative bodies of the country, from lowest to highest, great pains are taken by rules of order and sometimes by statute and constitutional restrictions, to render hasty and passionate action unlikely. The need of these precautions is so plain that no one raises any question concerning it, and it is not infrequent that action otherwise regular is annulled by the courts because such precautions have been disregarded.

If we may rely upon the reports mentioned in the daily papers, the proceedings taken at the meetings called to decide upon this great movement were not deliberate and dispassionate, but the speakers who were the chief actors were expected to and did appeal, not to the reason of their audiences but to their feelings and their prejudices. Speakers who it was thought could make such appeals most successfully were brought to the meetings for the purpose; they came to excite ther hearers to action, not to reason with them. The action taken was therefore had under the influence of excited feelings. Opposition to what was proposed was not expected, and was not patiently listened to. There was little in the proceedings that even resembled those of a deliberative

gathering. Not only, therefore, were other interested parties not given a hearing, but even those who were deciding what should be their own action in a matter vitally affcting the interests of some of their number, if not of all, contented themselves with listening to a passionate appeal and responding by an hurrah. The decision thus reached was conclusive. The general fact was that a deliberative and patient hearing was had by no one. This was the case until it was deemed necessary to appeal to other orders also, and then the proceedings were commonly quite different. The other orders paused to deliberate; but when deliberate action came to be taken, different results followed.

These matters are mentioned because they bear directly upon questions of justice and right that are necessarily involved when such a movement in the industrial world is proposed. With what justice can it be entered upon when innocent parties are to be sufferers to an enormous extent therefrom without their rights being taken into account, and their probable losses allowed due weight in reaching a decision? And how can men who live by their labor wisely or even safely throw up their employment as a means of coercion before they have carefully considered in all its bearings what is proposed, and what its effcts are likely to be upon their own interests, not only in case it shall prove successful, but also if it fails? This is said in all kindness, for plain talk is kind under the circumstances.

Fifth.—In our notice of this great internal commotion, some attention is due to a question of constitutional law which was raised by some of the governors of states. When interstate commerce was interrupted, the transmission of the mails seriously impeded and the service of process issued by the federal courts rendered difficult or impossible, President Cleveland sent to Chicago, the point of greatest disturbance and disorder, a considerable military force to aid the civil officers and to protect the carriers of the mails and the persons and vehicles employed in interstate transportation while they continued, or made efforts to continue, in the performance of the customary service. This at once brought out a protest from the governor of Illinois, who insisted that the President was encroaching upon the rights of the state. The foundation of the protest is understood to have been that the duty to maintain public order and enforce the laws was a state duty which Illinois was quite able and willing to perform, and the fed-

eral executive had no right to act in case of domestic disorder until demand was made upon him by the state legislature or state executive. Governors of some other states were understood to concur in this view. When the President replied to the protest that the United States troops were sent into the states only to enforce national laws, to put an end to interruptions of the mails, to protect interstate commerce, and see that the authority of federal courts was maintained—in other words to support the national jurisdiction and protect officers and agents in the performonce of national duties—the reply was treated as insufficient, the protest was repeated from time to time, and the consequent excitement tended to keep the disorderly element bold and defiant, so that the demand was even made by some of them that the governor should employ the military power of the state to remove the federal forces.

No doctrine exactly like this had before been advanced, though there had always been political parties, led by able statesmen, who insisted upon a strict construction of national grants of authority, and of the powers to be exercised under them. In this case the grant to congress of the power to provide for the transportation of the mails and to regulate interstate commerce was not questioned in the least. Congress had exercised these powers, and it was not claimed that it had encroached upon state rights in doing so. It had also provided for United States courts in Illinois, which were then in session, and it was not pretended that in using the customary process they could be lawfully interfered with or the process denied service. There were, therefore, national duties to be performed in Illinois, national officers, agents and courts to whom in part the performance was entrusted, and disorderly parties were interfering and rendering performance difficult, oftentimes impossible. But the position of the governor was that the maintenance of peace and that the repression of disorder was a state duty, and that the President was guilty of usurpation when he thus without request moved troops into the state for the purpose.

We cannot admit that the position taken is even plausible. It has no warrant whatever in the federal constitution, which, on the contrary, is distinctly against it. The President is to take care that the federal laws be faithfully executed, and his doing so is not made to depend upon the will or consent of any one state.

The duty is specially and in the plainest terms imposed upon him, and in the performance of it he is subordinate to no state authority. Yet if the views of the governor were accepted as sound, the mails might be stopped at Chicago, interstate commerce broken up, and the process of United States courts refused service, unless the governor, when disorder was dominant, saw fit to suppress it or to call upon the President to do so. If the protest was yielded to it was a concession that the governor and not the President was to take care that the laws of the United States were faithfully executed in his state, and if he failed to do so, a mob might at pleasure defy them. It seems needless to discuss this protest; the action taken by the two houses of congress in approving in emphatic terms the action of the President was equivalent to an expression of their opinion that the protest of the governor was not only unwarranted but revolutionary. The sentiment of the country as expressed in its public journals and otherwise was to the same effect, and the question of constitutional law may be considered practically settled. It is fortunate that it is so, for such a protest from the executive of a great state must necessarily tend at any time to still further excite the passions of those who in a mad way are defying the lawful authorities.

Sixth.—I have had something to say of the duties of members of our profession as public teachers, and I shall now add a few words as specially applicable to crises like the one here alluded to. In doing so I may perhaps without impropriety so extend what I say that it shall be applicable to all who, in important positions, and especially as members of our national legislature, are in greater of less degree dependent for their prominence as well as the opportunity to be useful upon the public favor. Very often they have to deal with difficult questions in government, such as those relating to political economy and finance, and we may suppose they have been selected for their positions because of their peculiar fitness and ability to do so wisely. But not unfrequently we feel compelled to question, as we follow in the journals of the day their public life, whether a legislator thus presumably chosen to act independently and fearlessly upon his own mature and enlightened judgment, does not sometimes, instead of considering with deliberation the question upon which he must act, content himself with gathering as best he may the sentiment of his constituents, and with expressing it in his public action, even when he

believes it to be erroneous and possibly dangerous, and when he cannot fail to perceive that the local sentiment is the result of artful teachiug by interested parties or by demagogues. It is easy in that way to float with a popular current, and perhaps to make sure of continued popular support. But the question must often be before his mind whether the current might not be altogether otherwise if in an honorable and fearless way he took steps to correct the erroneous views which, while he remains silent, are certain to control, and whether his constituents have not a right to expect of him that, instead of submitting to follow when he knows they blindly lead, he will give his best ability to making his service as useful as possible, to them and to the country, and to that end will endeavor to instruct his people when they need instruction as well as to lead them.

When the man who is both a statesman and a leader shall bring the results of observation and experience to a consideration of the difficulties which beset the relation of employer and employe, and which year by year seem to grow more troublesome, he may perhaps be expected to give anxious attention to the question whether the benefits of arbitration in that class of difficulties cannot be greatly extended. There is an impression that this is possible, and he will find laws on the statute books of the nation and of some states having for their object to aid in the removal, by means of a tribunal of peace, of the causes of contention which now in so many cases result in disorder, and in great pecuniary loss to one party or the other, commonly to both. He will inquire whether the benefits of such tribunals cannot by legislation be made to embrace all of what are known as labor controversies, and he will find many to urge upon him the view they hold that compulsory arbitration may be made a complete and adequate remedy when disorders prevail in the industrial world. Some attention to this view seems not unimportant.

Arbitration, as the word has come to us, is understood to mean the voluntary submission by the parties to a controversy of the matters on which they differ to the decision of one or more impartial persons whose award thereon shall be final. The most notable characteristic is that the initiation of the proceeding is voluntary; such at least has been the understanding hitherto. The tribunals to which the law gives compulsory power over the controversies of individuals are the courts, and even these are to deal only with

questions of legal right and legal obligation; they cannot enforce mere legal duties unless the law has made such duties legal also. But the vast majority of labor controversies involve, as between the parties to them, no quescion whatever of legal right. They involve disputes over wages or hours of labor where no binding contract exists that fixes them; disputes as to continuance of the relation, when one party or the other desires to terminate it and his moral right to do so is disputed, but not his legal right; disputes as the employment of non-union men, and the like. If arbi tration could embrace only the labor controversies in respect to legal rights, it would be of very slight value. The award on a voluntary submission may in other cases establish a legal right which the courts can enforce, but the limits to compulsory power in that respect must be very narrow. No employer can be compelled to continue his business when for alleged want of capital or of profits or for any other reason he refuses to do so, and laborers cannot be led by the sheriff to their daily task when they refuse to obey the arbitrator's award, that it is their duty to continue at their work. The award may in a sense be binding on the one or the other, but when it is the party obtaining it must in such case content himself with an action for damages.

If one shall say to us that it is as competent to provide laws for bringing parties unwilling before a board of arbitrators as before a court, and to make the action of one tribunal as much as that of the other compulsory, the answer must be that neither to the one nor to the other can powers be given to enforce against the citizen that which the law does not require him to perform. The name of a tribunal does not determine what powers may be given it; but when it is sought to obtain relief which the party summoned before the tribunal has a legal right to refuse, his consent to submit to the jurisdicion of the tribunal is indispensable. The state may even in such cases provide for investigation of the controversy by a tribunal established for the purpose, as congress has already done, but no t for a trial against the consent of the parties and compulsory submission to the decision. This seems unquestionable.

But, passing this question, let us see what would have been the position of the late controversy if at the time it arose there had been a national board of arbitration and a law of congress to compel laborers and their employers to submit to arbitrate their

disputes, And suppose we now undertake to apply such a law, and by doing so end the strike which is understood in some quarters to be still in force.

First, we are to bear in mind that the original controversy was between an Illinois manufacturing corporation and its laborers. The corporation gave notice that the laborers must accept lower wages than were being paid, or the business would be such that the works must be closed. The laborers called for arbitration, and the corporation replied there was nothing to arbitrate. A strike followed. We shall dismiss this now with the single remark that as the contract which had existed in this case was for service to be performed locally, the controversy could not come under any general law of arbitration, and the laborers, if wronged, must look to the state of Illinois for a remedy.

When the manufacturing corporation refused arbitration a strong union composed of railway employes in various branches of service declared a boycott and went out on a sympathetic strike. It is this strike that has been so damaging to themselves, and especially to the country. The immediate settlement of this, by compulsory arbitration or by any other just means, would have been a great boon to the country and to the industrial interests involved.

But suppose a national law providing for compulsory arbitration had then existed, and the strikers had demanded the intervention of the arbitration board, what must have been the result? Obviously, after the board had looked into the case it would have been compelled to say that under the law they could give no remedy, for it had no application whatever to the case. The strike was by railroad employes, and they and their employers were the only parties to it. But the cause of complaint which led to the strike was a controvesy between other parties altogether; parties who stood indeed in hostile attitude to each other, but were not parties to this strike, and could not be brought in to take part in the arbitration demanded. The board summoned to consider this would be wholly without jurisdiction to determine or even to look into the merits of the controversy which was the excuse for the one now brought to its attention. If, therefore, the board could take any action whatever it would merely report that the present strike was not based upon any complaint made against the railroad companies, that there was no controversy between the

parties to it to be investigated and passed upon, and consequently the board had no jurisdiction and must dismiss the case. This would seem unavoidable.

In what is said here it must be understood that no allusion is made to the probable action of a commission such as has recently been appointed by President Cleveland to investigate and report upon the late troubles. The President has made most admirable selections for the purpose; the country has confidence in the wisdom, the prudence and the integrity of the men chosen, and whether their report shall or shall not fully enlighten us as to the wrongs and rights of what has already taken place, it can scarcely fail to do something towards indicating for the future more satisfactory ways for dealing with labor controversies than by instituting industrial wars. The best wishes of the country will attend the efforts they may make in that direction, and we may be certain that remedies having their approval will be truly peaceful, which a strike on a large scale very seldom is.

But, if it were possible to establish compulsory arbitration in a case where the controversy was not between the parties to the strike, I should venture to ask whether parties injured by the strike, rather than those not injured and whose interests are sympathetic merely, ought not to be at liberty to appeal to the law. Consider for a moment what actually occurred here. A great many thousand persons were by the strike absolutely deprived of legal rights, and injured in the aggregate to an enormous amount. A great many passengers who had paid for being transported across the country, and who had a legal right to proceed without detention, were side-tracked without their consent, and were put to great inconvenience and pecuniary loss. A great many shippers of goods suffered loss by detention, and whole train loads of perishable goods were in somes case ruined by delays which the strike had caused. In every one of these and the like cases the injury was a direct result of the strike, and in many cases the circumstances were such that there would probably be no legal remedy against the carriers. The strike, therefore, resulted in the destruction of rights of unoffending parties who were powerless to protect their own interests, or to do anything by way of restoring the normal condition of things. Why should not the parties upon whom losses were visited under such circumstances be at liberty, under a law for compulsory arbitration, to appeal immediately to

the board for an investigation of the complaints, if any, made by the strikers against the railroad companies, and to insist that the board should take the necessary action to have the strike declared off when it was found that between the parties to it there was no existing controversy, or none over which the board could have jurisdiction? Why, for example, should not one of the great packers of Chicago, whose property in enormous quantities was to be ruined without his fault, and whose legal right to deliver it by rail to his customers was to be taken away, have been at liberty to demand the immediate intervention of the arbitration board, and its prompt determination that his legal rights must be respected? Parties whose interests were put in peril might, perhaps, under such a law, with entire justice, have protection given them even when the parties to the quarrel who had struck for sentimental reasons only did not see fit to invoke its assistance. No class of persons, not even the laborers at Pullman, had a stronger claim to the immediate intervention of a tribunal with peace-making powers than those who were being deprived of their rights in transportation. A woman, for example, traveling from New York to California, with ailing children and barely means enough for the journey, side-tracked and suffering for days at Battle Creek; whose claim to the immediate intervention of a compulsory board of arbitration could be greater than hers? And she was no outside party, as were the laborers at Pullman, but was directly and immediately concerned.

In what I have here said I have endeavored to point out in few words some of the obstacles in the way of making compulsory arbitration the effectual remedy in labor controversies, which many seem to think it must in time become. The personal liberty of both the employer and the laborer is necessarily to be respected, and every man must determine for himself whether he will observe and perform such moral or sentimental obligations or recognize such claims as the state has never deemed it wise to convert into legal duties or legal rights. Upon these and kindred subjects a true leader may make the inherent difficulties so plain that destructive conflicts will become inexcusable and also uncommon. But he can also point out that by contract, when the service begins the peaceful remedies provided by law can be greatly extended; that the sudden termination or damaging change of the relation by either party can be provided against, and that any

other stipulation, important for the security of rights or to guard against the consequences of misfortune, may be made part of the terms of employment. The usefulness of such stipulations may be made so plain that they will, as time passes along, be more and more resorted to, and the legislation in furtherance of peaceable settlements, though it must fall far short of adequately providing for all disputes likely to arise between employers and their men, will nevertheless so forcibly express the public sentiment against existing methods that we may reasonably expect such methods will in a little time become far less common than now, if they do not altogether cease to be resorted to. The legal difficulties in the way of a complete remedy will remain, and will be serious at almost every point, but the very knowledge of their existence will emphasize the need of precaution to prevent a resort to violent measures when arbitration is inadequate, and to give additional force to the public opinion which will look with emphatic disfavor upon any refusal of arbitration when that seems a suitable and sufficient remedy for alleged wrongs. The employer cannot be compelled to continue his business when it has become unprofitable; that is plain; but if the contract of service is for a definite time he must expect to respond in damages if he terminates it before the time has expired, whatever may be his excuse. If the laborer leaves the service before the time of hiring is completed, he too may be liable in damages, and the employer must rely upon this liability for redress, and will be supposed to take into account the possibility that the laborer may prove irresponsible as one of the incidents necessarily affecting the pecuniary results of his business.

But, perhaps, the legislator or the commissioner who will lead us in this important work may look for the most useful results to flow from his or their efforts in familiarizing the classes to be affected with the thought that if disagreements arise peaceable measures, founded on a review of all the facts, are to settle them. The looking forward to such a settlement will of itself have a powerful influence in bringing it about, and when it comes to be fully understood that the states and the nation alike are wanting in power to force upon unwilling parties such arbitration as shall be effectual in all cases, we shall, perhaps, be spared the sorrowful spectacle of wholesale destruction of the rights and property of innocent persons which must almost of necessity result from a strike or boycott so extensive, undiscriminating and persistent as was the case with the one above brought under consideration. And our statesman-leader, we may be sure, will never overlook the fact, or fail to give it due prominence,

that there is one class of strike that can never be settled by arbitration. That is the sympathetic strike, and the reason is plain: the parties to the strike are not the parties to the controversy that needs to be settled, and if the sympathizers are held justified, the original quarrel still remains undetermined. A finding made by a given number of arbitrators as to the merits of the original controversy in such a case would be an idle fulmination of opinion, having behind it no force of law, and going no farther to fix a moral obligation upon any party concerned than would a like expression by any other equal number of equally intelligent members of the community.

I have spoken freely on this subject because it seemed possible that at this time and place it might in some degree be of service. I shall venture in closing to add the expression of an opinion that the members of the legal profession, whenever it may seem practicable for them to speak or act in the general interest of the laboring classes of the country, will be ready and desirous to do so. They will feel this to be a duty which they owe not to those classes alone, but to their fellow-citizens generally, every one of whom is concerned in the welfare of workingmen. They will endeavor to have all laws which specially affect the interests of laborers just and right, and to see that they are so administered as to secure to all whose daily labor must give to them and their families the means of support, the just rewards of their industry. Especially may they be expected to give attention to the devising of lawful and suitable means for the prevention of angry and violent contentions in the industrial world, in the nature of destructive civil wars, which are now so frequent, and the institution therefor of such peaceful remedies as will neither disturb existing employment, draw heavily upon the earnings of labor, or generate feelings of bitter animosity between classes who prosper most when their relations are most amicable. The problem will be found a difficult one, but its consideration in a sympathetic spirit and with the painstaking perseverence which its importance demands may possibly lead to most unexpected results in the removal of existing causes of antagonism and harmful enmity, and to such signal benefits for the country at large that the recognition of the service will be generous and perhaps more satisfying to those who are its objects than could possibly be such political honors as are conferred merely in recognition of faithful party allegiance and party service.

But when compulsory arbitration is proposed as a remedy for wage disagreements is not the question pertinent, shall it be rents next, and then again, what next?

GRAND JURIES.*

O'BRIEN J. ATKINSON.

The present grand jury system is the offspring of a popular method partly borrowed from Normandy, and practiced in England prior to the days of Bracton, who was Lord Chief Justice in the time of Henry the Third for about twenty years (A. D. 1253–1273). Much that has been written on this subject was drawn from Bracton, who had been one of the itinerant judges of the kingdom for about nine years (A. D. 1244–1253), and when he came to the task of composing early English law books he was fairly well equipped, and his statements may be safely accepted as correct.

The grand jury system is interwoven with those municipal divisions of England called "hundreds," which may rest for their authority upon the eighteenth chapter of the book of Exodus where Moses accepted the kindly counsel of Jethro, the Midian priest. The narrative runs thus: "And Moses chose able men out of all Israel and made them heads over people; rulers of thousands; rulers of hundreds; rulers of fifties and rulers of tens."

The English "hundred" might be a subdivision of a shire embracing one hundred families; one hundred warriors, or one hundred manors. A convenient subdivision of the kingdom instituted by King Alfred (about A. D. 897) for the collection of tithes, the protection of property, the promotion of local government, and the suppression of crime. These "hundreds" were represented in the "shire mote" just about as our townships are represented on the county board of supervisors.

An ancient method of presenting criminals for trial required the whole population of the "hundreds" to assemble at the county seat, or some convenient center before the itinerant justices in their circuits through the kingdom, at which time such accusations as they desired were made against offenders of every class. Practically the entire populace were the accusers, and

* A paper read before the Michigan State Bar Association at the last annual meeting.

balances sufficient to guard against unwise presentments, and no guide at hand to prevent gross injustice. The grand jury may accuse and indict as they did of old, after which the trial jury may acquit, as they frequently do, but this does not restore the citizen to the high place in public favor which he formerly occupied, amd frequently the stigma of that indictment remains uneffaced forever. If we look to the civilization under which the grand jury system had its origin, we shall find it flourishing alongside of trial by the compurgators of the common law in which an accused party testified to his own innocence, and then brought eleven neighbors to make oath that they believed what he swore was true; and then eleven others might swear they believed him false, and on such guesses, beliefs, prejudices and devices men were convicted or acquitted during the time when the grand jury had its triumphs. The grand jury was contemporary with many evils in the English law. It existed in that state of civilization which permitted a British subject to bring his wife into a public market with a halter around her neck to offer her for sale, and the accompanying privilege which that husband enjoyed was the right to chastise his wife for the proper discipline of the family. The grand jury was the companion of this system and those evils. They were harnessed together in life and fitted into that civilization; they were running mates in the progress of our people towards our present high idea of liberty, and when one died the mildew of misuse fell upon the other. The tastes of people have changed so much that neither should be tolerated any longer. The companions of the grand jury are too odious to enumerate; they grew out of the condition of society which substituted force for law and were the creatures of "those olden times" attested by numerous jails, many scaffolds and unnumbered executions, and the decadence of which is great cause for rejoicing.

> "Those olden times, how many days are spent,
> In vain regret and hollow argument,
> To prove them wiser, happier than our own;
> The oldest moment which the world has known
> Is passing now.
>
> "Those boasted times were young,
> Their learning from unlettered peasants sprung;
> Their laws from barons arrogant and rude
> Their justice force, their whole achievements crude."

In those "olden times" we had a brood of accusers; an army

of spies; a regularly enrolled list of government informers; a group of professional perjurers and traitors; detectives swarmed every highway and vigilance committees were forced into existeace. Even the house of parliament had its secret committee parading the country ready to deceive the burgher who kindly gave them hospitality.

It is true the *habeas corpus* existed, but its suspension was a common occurrence during which many an imprisoned patriot surrendered his existence while waiting for the appearance of this sacred writ. It will not do to say that the grand jury stood between the citizen and his oppressor in olden times when a monarch regarded not the rights of men, because those times cannot be repeated; they should not be repeated; they do not fit into our civilization. All possible arbitrary power has been taken away in this country, and precautions against its exercise are found in the constitution of the United States and in every state constitution. The humblest citizen is as safe in his liberty as the president of the United States, and to hold up such a body now as a guard against such danger is unworthy of the sanction of serious men. We used to build stockades around our settlements to guard against wild beasts and savage indians, protecting them outside by deep moats filled with water, crossed by draw bridges and other devices for saving life. What would you think of a city resorting to such a precaution now, after the wild beasts have perished and the savage indians have become civilized or extinguished. Yet such a proceeding would be a tribute to the past and no more absurd than the argument by which grand juries are perpetuated. By retaining guards against evils which have disappeared, we are liable to neglect the pressing duties of the present hour and to forget that,

> "New occasions teach new duties,
> Time makes ancient good uncouth."

II.

The constitutional convention for the state of Michigan in 1850 deserves well of this commonweath. That convention found this system of accusation in full play and in scanning its debates we find a few able men who clung to the past in defending this ancient relic. They even sustained its secret methods while admitting that "Indictments were frequently found against worthy

citizens upon evidence which was supposed to exist, but which in fact had no existence at all, and was fully proved to be without foundation."

That convention contained many distinguished jurists, among whom was Daniel Goodwin, from whose speech I have made this abstract. In that convention, however, many of the ablest lawyers of the state opposed the grand jury system because it deprived the accused of the inalienable right to confront the witnesses against him. It was secret in its operations and inquiries. It was expensive to the state and often ruinous to the character of honest men. The maxim, *Ratione cessante cessat lex*, was then recalled and applied by those distinguished men, but was not quite strong enough to strangle the evil entirely. I commend the debates in that convention to every student of good government, and I recall with pleasure the sentiments of James Sullivan, of Cass county, a lawyer educated in New Hampshire, and A. S. Robertson, of Macomb county, an Englishman by birth, and a jurist of marvellous ability.

The grand jury system in its recent operations has not removed the objections urged in that convention, and there is nothing to commend it to the people of this state. I refer to just one instance, the Lauder case, which was before our supreme court in 1890, as the outgrowth of municipal agitation in the city of Detroit. A number of citizens were indicted, including J. Chris Jacobs, but they were all afterwards acquitted or discharged without trial. While the jury was considering the accusations against Lauder, he was brought before them on a subpœna issued by the assistant prosecuting attorney. No intimation was given to Mr. Lauder regarding the purpose of this proceeding; the usual process of subpœna was not used in this case. No counsel was possible or would be permitted, yet questions were asked and answers received which aided in his indictment, and our supreme court felt constrained to say that the law gave no remedy, even in the face of a constitutional provision which provides that, "No person shall be compelled in any criminal case to be a witness against himself."

But it is said by those who advocate the grand jury system that accused parties might escape unless the proceeeings are secret leading up to their indictment. Such an argument might have force in an age when transportation was less perfect than at present, and when news traveled with the snail pace of stage

coaches and canal boats, but it has no force in the present age of continental and ocean telegraph; when railroads penetrate to every part of our republic; when telephones enable us to converse without regard to distance; when extradition treaties cover nearly every possible offence; when settlements and towns, cleared farms, daily newsprpers and general intelligence have supplanted the old systems. Under such a changed condition it is the wildest absurdity to contend that any necessity exists for secrecy in the investigation of crime further than is supplied by well disciplined police forces, or by the energy of government agents.

We cannot go too far in protecting the accused when the power of the government is hurled against him. He is nearly defenceless by the circumstances of his unfortunate isolation. He is like the boy sentenced to be shot in war times for desertion when the great body of his fellowmen were on one side; loaded rifles in trusty hands, for his execution, were before him; his coffin and his exposed position were his only companions, and his young life counting its earthly existence by a few seconds. Under such circumstances the advantages are all on one side, and if some one should suggest that in this emergency, the assailing party, with rifles, should be provided with coats of mail, or placed behind breastwork, it would be no more absurd than to insist that the grand jury of inquisitors sworn to secrecy and thus shielded should be permitted to indict any citizen who had no possible opportunity for defence.

But there are other evils attending the grand jury system which can only be effaced by its entire destruction, or such reformation as will change its identity. If the witnesses before a grand jury perjure themselves, you could not prosecute them at common law because the oath of secrecy prevented the panel from disclosing their testimony, and even under the statutes of Michigan it would be difficult to accomplish their conviction. If a jury use newspaper reports, or look at improper affidavits, or act largely upon their own information, or take testimony that would not be admissible in any court, there seems to be but little remedy unless their finding is entirely unsupported by legal evidence.

Inquisitors of this character have been known to send for a man's wife and compel her to testify in violation of every known principle of law and in total disregard of the sacred domestic relations which she sustained towards the accused. The prosecut-

ing attorney or his deputy may guide this jury by trick or device or importunity, or he may dismiss them by the simple statement that the government has no further business, after which another jury may be summoned within an hour until one is found sufficiently subservient to bring in the indictment which is so earnestly desired. Even in this state an assistant prosecuting attorney appointed for special duty in another case was allowed to sit upon a grand jury where his principal desired an indictment. Theoretically his selection was without flaw, and appeared to conform to the statutes in that he was returned by his supervisor, but really it was a violation of fairness and should not have been tolerated. The record of that case disclosed the fact that this gentleman was a stenographer; he was selected three days after the jury had been sworn, and after all instructions had been given to them by the court, yet notwithstanding all these defects the law required that the indictment should stand.

Theoretically there is some exemption from the secret search of this body of inquisitors, but practically that exemption is of but little value. Law writers in many instances have condemned the whole system, and the grand jury itfelf on many notable occasions has declared the system to be useless and antiquated. It is only the strong and powerful who can resist their illegal inquiries.

In the reign of Henry the Eighth history boasts that the grand jury was present to protect the citizens of the British empire, yet not less than seventy-two thousand suffered death by hanging during that one reign, and the recorded instances where the grand jury has protected the liberty of any citizen are very rare indeed. They may delay his trial; the veil of secrecy may be removed in case a witness changes his testimony; they may appear as witnesses if prosecutor is charged with perjury before their tribunal, but lawyers know that all pretended secrecy is of little value because the debates of the jury room become the gossip of the neighborhood within a few months, and if the subjects examined are important the story soon enters the circulation of great newspapers, so that whether indictments are found or rejected, the character of public men may be seriously stained.

It is a laudable ambition in every citizen to seek the approval of his fellowmen or merit their good opinion, and I cannot conceive it possible that any one would consent to be indicted by a grand jury even though his vindication was within reach and his right

to acquittal as clear as the sun in the heavens, or as certain as the return of day after night, because no vindication could possibly remove the stain upon his honor or avert the sorrow which a wife or daughter would feel when told that the husband or father had been indicted by the grand jury. The appetite for sensation would make the news of such indictments travel to the sun while the refutation or explanation was wasting its strength in the immediate neighborhood. Life would not be long enough to send the explanation to every heart, so that an injured character would not be entirely restored.

But it may be suggested that grand juries are useful in breaking up conspiracies, and reaching into the retreats where crime is planned, that in counterfeiting, distilling, smuggling and such occupations the great number engaged, and their tortuous methods demand secrecy in detecting and indicting the guilty parties, but I contend that even here it is a failure because its first step is too public, and the very assembling of the jury itself is a proclamation to all evil doers of that class to strengthen their lines, guard their weak companions, even kidnap suspected informers, and evade exposure until the jury is discharged.

Another trouble lies in the danger of confiding every step in such inquiry to a large jury in a county where relationship, friendship, intermarriage and other ties may be stronger than the oath of secrecy, and the substitute provided by our law in the present method is much more perfect by laying a complaint before one justice and then subpœnas for all needed witnesses before any arrest is made or any alarm given. A discreet prosecutor and one justice can certainly be trusted more safely with the rights of the state and the character or the citizen than a jury chosen by lot, even if secrecy be the main object.

The ordinary method now pursued in Michigan, consisting of complaints and examination in public, has a manly fairnes sabout it when we look upon the accused citizen and study it from his standpoint. Under this system before an indictment can be had an open examination must be conducted where all the witnesses can be tested by counsel, and confronted by the accused, and where all the proceedings are under rules of law in which only proper evidence is admissible. The witnesses too are more likely to be truthful, as they sign their depositions and their narrative is at once exposed to the searchlight of the fullest investigation. Under this system the state may use those depositions in the event

of death, absence, insanity or possibly other reasons for not calling the witnesses again.

III.

It is extremely difficult for me to conceive any condition where a grand jury is desirable, or where its secret methods would not be productive of evil. When I consider that they may be approached secretly and may be imposed upon this objection is greatly enhanced, especially when I remember that after indictment is found no examination in public is possible, and the defendant is not even entitled to copies of the minutes taken before his accusers.

The people of the state may gain a slight advantage over a respondent by these shady proceedings, but liberty and justice are stabbed to the heart by such methods. The advocates of the grand jury system point to many instances where the law provides for the public examination before commissioners, and then for a second examination by the grand jury before their indictment can be found, and it is urged that these steps afford additional safeguards to the accused, but observation proves this to be a fallacy, because in such instances the commissioners feel less responsibility, and they hold men upon proofs less convincing than would be possible if they were the only responsible party between the arrest and trial. In such instances the duties of the commissioner is performed when he gets a little evidence against a respondent and finds a strong desire to have him held for trial, because he would say: "In any event all this testimony must be reviewed by the grand jury."

There are conservative people in every calling, and we have a large school of conservative lawyers; men who are great admirers of venerable institutions, These men are eminently respectable; even their Prince Albert's coats buttoned close up would indicate the erectness of their characters. A few such men appear at every convention where the grand jury system is assailed and they plead for the venerable relic with a captivating plausibility. They refer to the Magna Charta, and to Lord Coke's interpretation of the 29th chapter of that memorable concession in which he asserts, "No freeman was to be restrained of his liberty unless by indictment of good and lawful men."

We must however act up to the inspiration of the age in

which we live. This republic demands a broader charter than King John or his nobles could conceive. The pendulum has been swinging for centuries in the direction of liberty, and there can be no complete liberty where there is a secret body of inquisitors searching for faults, and proceeding outside of the regular rules of evidence. How truly the saying of Bentham is to-day, when he objected to this secret inquisition by contrasting the two juries known to English law in this way: "Of the procedures before the trial jury a characteristic and indispensable property is publicity; of the proceedings before the grand juries, a property still more characteristic is secrecy.[1]"

The searchlight of public opinion should accompany every criminal investigation, and because such a process is impossible before a grand jury I commend its entire destruction.

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[1] Law Magazine, 1880-81, Vol. 6, page 370.

NOTES.

JUDGE COOLEY OR GOV. ALTGELD?—When Gov. Altgeld speaks of Judge Cooley's utterances upholding President Cleveland in his effort to execute the laws of the United States as "born of a grateful dotage," he shows, as he has so often shown, extremely bad taste. Judge Cooley has always expounded the constitution like a freeman, and it is no wonder that he clashed with Gov. Altgeld. The one is known as the expounder of law and justice; the other as the governor of a state, but suspected of anarchistic tendencies.

THE ASSOCIATION OF JUDGES OF MICHIGAN.—The next meeting of the association which was formed at Lansing last winter will be held at the same place, commencing December 27 at one o'clock in the afternoon and continuing through that and the following day. The committee in charge have an excellent program in preparation which will be announced later. The association has proven to be a great success. All judges of the supreme and circuit courts and of the municipal courts of record are eligible to membership. If proper interest is continued to be manifested in the Association of Judges and in the State Bar Association by the respective members, the citizens of Michigan will have reason to feel proud of its bench and bar.

THE INJUNCTION AGE.—In the industrial world the present era has been frequently called the "Age of Electricity," but from a legal point of view it can with equal propriety be termed the "Age of Injunctions." No small portion of the next edition of the works on the subject will be devoted to a consideration of the new use to which this extraordinary remedy has of late been put. Quite an amount of space in the legal magazines, and the press generally, has already been given up to a discussion of the subject. Various views have been expressed as to the legal and equitable right of the courts to give the writ such sweeping effectiveness. As a rule, where an expression has been made by one who has given the subject careful thought, the seal of approval has been set upon the action of the courts. A few have seen fit to question the justice or propriety of investing the court with such unusual powers. Some have even doubted whether it will be possible, in this summary manner, to remedy the evils aimed at, and

bring about the desired results. One of the latter is Walter Murphy, Esq., of Utah. He concludes a very interesting and able address upon "The Use of the Writ of Injunction to Prevent Strikes," before the first annual meeting of the Utah Bar Association, with this sentence: "If modern industrial warfare is to be stopped, it can be stopped only by an alteration of the conditions which produce it." In the light of recent experience, Mr. Murphy, and those who hold similar views, must admit that the judicial application of the injunction has had a most salutary effect, and created far more than an "eddy in the stream of events."

JUDGE COOLEY'S ADDRESS BEFORE THE AMERICAN BAR ASSOCIATION.—In his address, read before the last annual meeting of the American Bar Association, Judge Cooley discussed, (1) the "Coxey movements," (2) the Pullman strike and boycott, and incidentally Gov. Altgeld's position, and (3) Arbitration as a means of settling disputes between capital and labor. Regarding the so-called "Coxey movements," and the effects of such movements upon our government, Judge Cooley had previously expressed himslf when discussing "The Fundamentals of American Liberty," in the June number the LAW JOURNAL.[1] Speaking of the great Pullman strike, he says,[2] "A sympathetic strike is bad in morals, and must be quite as bad in policy, when the possible injury to innocent parties will exceed the probable benefit to the parties it aims to assist." The *Detroit Tribune*[3] editorially criticises the above quotation from the president's address, and says: "The boycott is always wrong, whether it does more harm than good, or more good than harm." Judge Cooley speaks as a lawyer, and not as a preacher; the *Tribune* does not speak from a legal standpoint, hence its variance from Judge Cooley. A boycott is always bad, morally speaking, but it is not necessarily illegal, or unlawful; and while the boycott may not be unlawful, all wise citizens must agree that it proved bad in policy. Judge Cooley's writings and opinions have withstood the criticism of the ablest lawyers, and the highest courts in the land, but nothing he has ever written has been more carefully prepared than this address. While he is as far from belonging to the Calhoun school as he is from the opposite monarchical school, Judge Cooley maintains that the preservation of the states in their integrity is necessary to the preservation of the Union; that the jurisdiction of state and nation are absolutely distinct, and that the President had the right under the constitution to execute the federal laws, irrespective of the consent or opposition of the state authorities. At all events, the sentiment of the entire country, north and south, uphold the President, and no court has as yet decided that he has transcended his prerogative.

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[1] 3 Mich. L. Jour., 149. [2] Supra, 243. [3] August 24.

BOOK REVIEWS.

LLOYD ON BUILDING AND BUILDINGS.—A Treatise on the Law of Building and Buildings; especially referring to Building Contracts, Leases, Easements and Liens. By A. Parlett Lloyd, of the Baltimore Bar, author of "A Treatise on the Law of Divorce." Second Edition. Boston and New York: Houghton, Mifflin and Company. 587 pp. $5.00 net.

We are crowded this month, and therefore cannot give this excellent work the space it deserves. Ever since the first edition was issued, more than five years ago, it has occupied its field exclusively. So satisfactory has it proven that no other similar work has been deemed necessary, in this country at least. The author has met the present needs promptly by preparing this second edition. This he has done with the same pains-taking care which characterized the first edition. While it is true that a great deal of the subject matter of this work has been treated in other works, yet much of it cannot be found elsewhere, and for the purpose for which it is intended it is far superior to the combined treatment of the subject in all other works. The digest of the leading decisions on building contracts and leases, the glossary of words and terms commonly used by builders and artisans, and the appendix of forms useful in building operations, are some of the most valuable features of the work. We have tested the work with several hypothetical cases and have not yet been able to find a single question, which might arise concerning this branch of the law, which was not treated in a satisfactory manner.

IRWIN'S ANNOTATIONS, Supplemental to Howell's Annotated Statutes of Michigan, by William W. Irwin, of the Kent County Bar, Grand Rapids, Michigan. Published by the author. 117 pp. $5.00 prepaid.

This looks like a small book for five dollars, but a careful examinaiion will convince one that it is worth every cent of the price. It is not intended as an ornament to the book-shelves of a library. It is not a book to be occasionally used. It is an everyday working tool, and should always be near at hand, on desk or table. The book is claimed by the author to refer to *all* alterations of the statutes made by the legislature during the years 1892–3, and *all* decisions of the supreme court, not included in Howell's statutes, to and including volume ninety-eight of the Michigan reports. Of course we cannot vouch for the absolute correctness of this claim. But we have no reason to doubt that the author is perfectly justified in making it. We have had it on our desk for several weeks and have had occasion to use it many times, and have found its annotations to be full and correct in every instance. The book is arranged with "stubs" in the back part, so that supplements may be pasted in at any time. Mr. Irwin proposes, as often as a Michigan report is issued, to furnish a supplemental annotated slip for twenty-five cents. In this way the annotations may be kept up to date at a very small expense. The careful lawyer, who has spent many a weary hour annotating his statutes, will welcome the advent of this book. Instead of three cumbersome volumes to handle, he will find the work done with more accuracy and precision than he could give to it, and arranged in a much more convenient manner.

MICHIGAN LAW JOURNAL.

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ARBITRATION OF LABOR TROUBLES.

MOSES TAGGART.

The principal benefit derived from courts is, that the controversies of imperfect, shortsighted mortals are settled, not always settled right, frequently settled wrong, as judges are but human; but differences that might have lasted a lifetime are ended. One or the other of the parties is likely to still be dissatisfied with the court, his counsel, or both; but there is such general confidence in the integrity of our judges, the public will believe their decrees founded on law and justice. This well-grounded faith in the efficacy of courts leads in these troublous times to the belief, that all matters in difference between capital and labor, employer and employe, may and should be settled through courts of arbitration.

Regardless of the difficulty or impossibility of enforcing awards that might be made upon many of these questions, if submitted, or lack of authority under federal or state constitutions to create such courts with powers sufficient to make them of practical utility, it is still urged that arbitration is the specific that will make of this country a modern Utopia. Much may be accomplished by voluntary arbitration. Public sentiment is favorable to peace and peaceable methods. Any scheme that promises such solution of quarrels, public or private, is generally applauded, and the individual who opposes it, either because he is unfriendly to arbitration, or because he has nothing to arbitrate, condemned. The opinion is quite common that as to all these matters of dispute, compulsory arbitration may be made effectual.

The object is not in this brief paper to consider in particular, or in the abstract, the blessings of arbitration. They are of the same character as benefits resulting from judgments of courts, or the verdicts of juries. Such judgments tend to substitute

order for disorder, peace and prosperity for anarchy. How far can arbitration be carried, and to what questions can it be practically applied under the state and federal constitutions?

The judicial power of the United States is vested in the Supreme Court, "And in such inferior courts as the congress may from time to time ordain and establish."[1]

This judicial power extends, among other things, "To all cases in law or equity arising under the constitution, the laws of the United States and treaties made, or which shall be made, under their authority, to all cases affecting ambassadors, other public ministers and consuls, to all cases of admiralty and maritime jurisdiction, to controversies to which the United States shall be a party, to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state, claiming lands under grants of different states, and between a state or the citizens thereof and foreign states or subjects."[2]

Aside from where the constitution, or laws of the United States, or the rights of certain classes of citizens or officials are involved, the federal courts existing, or to be created, have no jurisdiction whatever. No court of arbitration that congress has power to call into existence, can have its jurisdiction further extended. The power to arbitrate through national courts of arbitration therefore, in questions growing out of labor troubles, is very much circumscribed.

Wherever the federal government may employ labor or contract for it, there can be effective arbitration, if congress shall pass the proper law. Also, in cases where the United States courts are given jurisdiction, but it is clear, that arbitration cannot be extended beyond such cases. President Cleveland's expressed intention to appoint arbitrators, and recent appointment of them, in connection with the Pullman strike, under the act passed by the Fiftieth Congress, has attracted much attention, and favorable comment. The act only contemplates voluntary arbitration. No provision is found in it for the enforcement of any award made. At most, action under it is only advisory.

The stating part of this act is as follows:

"That whenever difficulties or controversies arise between railroad or other corporation companies engaged in the transport-

[1] Art. III, § 1.
[2] Art. III, § 2.

ation of property or passengers between two or more states, between a territory or state, within the territories of the United States, or within the District of Columbia, and the employes of said railroad companies, which differences or controversies may hinder, impede, obstruct, interrupt or affect such transportation of property or passengers, if upon the written proposition of either party to the controversy to submit their differences to arbitration, the other party shall accept the proposition, then and in such event the railroad company is hereby authorized to select and appoint one person, and such employe or employes, as the case may be, to select and appoint another person; and the two persons thus selected and appointed to select a third person, all three of whom shall be citizens of the United States, and wholly impartial and disinterested in respect to such differences or controversies; and the three persons thus selected and appointed shall be, and they are hereby created and constituted a board of arbitration with the duties, powers and privileges hereinafter set forth."

The act makes it the duty of such board to organize at the nearest practical point to the origin of the difficulty, and to hear and determine the matters in difference of parties and their witnesses. After concluding such investigation such board "Shall publicly announce its decision." This decision is to be reduced to writing, signed by the arbitrators, and with the testimony, be filed with the labor commissioner of the United States. The employes interested in the controversy can designate a person to act for them in the selection of an arbitrator.

This act then goes on to provide for the selection of two commissioners by the president, who, with the commissioner of labor, "Shall constitute a temporary commission for the purpose of examining the cause of the controversy, the conditions accompanying and the best means of adjusting it; the result of which commission shall be immediately reported to the president and congress, and on the reading of such report, the services (of such commission) shall cease." This act directs what action the commission shall take to get at the facts, so that it may "advise the respective parties what, if anything, ought to be done or submitted to by either or both to adjust such dispute, and make a written decision thereof."

This decision is to be made public, to be recorded on the books of record in the labor commissioner's office, and a copy filed with the secretary of the state or territory in which the contro-

versy arose. Then follows a provision for payment of the fees and expenses of the commission by the United States, fixing the pay of each member of the tribunal of arbitration for time actually employed, to be also paid by the United States. Provision is made for the appointment of clerk and stenographer, and such services, and also those of United States marshals, are to be paid in like manner. The act is crude and ineffectual for any purpose, except that its double-headed tribunal, in its reports may, by thus advising parties "what . . . ought to be done," create sentiment favorable to an amicable adjustment of differences.

It is diluted but expensive sop, for the benefit of somebody's constituents, containing but little nutrition for the suffering. By its terms it is only made applicable to railroads, transportation companies and their employes, who are engaged in interstate commerce. To but few of the numerous controversies liable to arise between employer and employe has this measure of such doubtful value any application.

The constitution of the state of Michigan contains the following provision: "The legislature may establish courts of conciliation, with such powers and duties as shall be prescribed by law."[3]

There has been for many years a Michigan statute authorizing, by agreement of parties, the arbitration of all matters that might be the subject of a suit at law, or an action in chancery, excepting questions relating to real estate. This statute[4] is not based on the constitutional provision above quoted, and is but an enlargement of the common law right of arbitration. It provides for voluntary arbitration, and is only applicable to controversies that can be litigated in courts of law or equity.

In 1889, the legislature of the state of Michigan, with this provision of the constitution evidently in view, provided for a "State Board of Mediation," to settle grievances and disputes between employer and employed, by voluntary agreement of such partis."[5] By its provisions, the governor, by the advice and consent of the senate, may appoint three persons, members of such court, whose terms of office are, after the first appointment for one, two and three years, to be three years. This board is given

[3] Art. VI, § 23.
[4] How, Stat., Ch. 292.
[5] 3 How. Stat., Ch. 244b.

a clerk to keep its records, issue subpœnas, etc. When a dispute shall arise between an employer and employe, it is by this act made "lawful for the parties to submit the same directly to said state court." The parties are then required to submit their causes of grievance in writing, and agree in writing to submit it to the decision of the court, and to continue work "without a lockout or strike," until the decision, which is to be rendered in ten days. The court investigates and takes testimony, much in the same way as the arbitrators under the federal act, and is to render its decision in writing, filing one copy with the county clerk, and giving one to each of the parties. No provision other than the agreement is contained in the act, for enforcement of the award. A further provision of the act requires the court, when a strike is threatened in any part of the state, to proceed at once to the point and investigate, and endeavor to secure an amicable settlement. Yearly this court is to report to the legislature. No members of such court have been appointed, and the act remains a dead letter, presumably because regarded as impracticable.

Whether a "Court of Conciliation" such as the state constitution contemplates, can be created with powers so broad as to reach and compel settlement of differences growing out of labor troubles, may well be questioned. The astute legislator, if he has the will, has never found the way to secure such legislation in the forty-four years that have passed since the adoption of such constitutional provision. Most of the differences between the laborer and his employer arise from the desire on the part of one to receive more for his services than the other is willing to pay. The laborer claims he cannot provide for himself and family on the wages offered, and the employer that he cannot pay more without loss in the business in which he is engaged. Can this question be adjudicated and settled by a court of arbitration or conciliation, and parties compelled to abide by the award? The difficulty and impossibility of enforcing such an award, and compelling parties to submit to either the arbitration or award, has frequently, in recent discussions, been pointed out. To be equitable it must be mutual, as before the law all are upon the same footing.

If a court of conciliation should decide that men employed in any business were overpaid and that they must labor for less, how could it compel them to remain and render services against their will? This would not be voluntary service, and "involuntary

servitude," except for crime, is prohibited by the federal constitution. If such tribunals should conclude the employer could pay higher wages, how could it make him do so against his will? Would it take possession of his plant, and operate it, or of his property, to meet the demands of his workmen? Would not this action conflict with the prohibitory clause found in the federal and all state constitutions, that no person shall be "deprived of property without due process of law"?

Education may accomplish much. A court of conciliation, acting as an impartial adviser, may be the mutual friend that will educate, and thereby materially aid in solving the problem, which like the poor will always be with us, until the millenium shall come.

These questions are of vast moment. It behooves every patriotic citizen to give them careful thought. Unstinted condemnation of employers, whether as individuals or corporations, or labor organizations, honestly seeking the betterment of the toilers, are alike to be deprecated. The present does not call for the ranting of the demagogue or the judgment of the Pharisee, but the rather, farseeing statesmanship based upon charity, unadulterated precepts of Christianity.

Labor controversies and strikes often lead to lawlessness and crime. The result is none the less damaging because the criminal classes, availing themselves of such opportunities, are largely responsible for the outrages perpetrated. They breed contempt of law, socialism and anarchy. Lawbreaking, destruction of property and commerce, open defiance of authority, are but treason to the nation, to be met with force requisite for their defeat and punishment.

If proper treatment of the conditions preceding violent outbreaks will avoid them, then the old adage that "prevention is better than cure," is again verified. Under existing laws, no court of arbitration or other court that may be created, can be vested with jurisdiction to make a decree or award that will more than alleviate the trouble, as such decree cannot be enforced. The remedy, if one exists, lies further back than in the creation of courts of arbitration or legislative declarations of their jurisdiction. Laws may be enacted regulating the carrying on of different kinds of business, the employment of labor therein, declaratory of the form of contracts to be executed between employer and employe, and imposing penalties for the failure or refusal to

comply with the same. Special supervision and authority to enforce such laws might be given to the state labor commissioner, or a labor bureau. So far as corporations employing labor are concerned, less difficulty would exist. They are the creatures of statute, subject to such conditions as the legislature sees fit to impose. In the acts passed authorizing their organization, there can be embodied provisions directing the form of contracts of labor, and regulating its employment, binding alike upon both parties. If such provisions are ignored or violated by the company, such action might operate as a forfeiture of corporate rights, or if by the laborer, of certain portions of wages reserved, or, penalties can be imposed.

Laws have been enacted in Michigan common to all or nearly all of the states regulating in various ways contracts made in ordinary business transactions. We have laws establishing mechanics' liens, giving preference to labor claims, regulating sales of various products, requiring written contracts for sale of land, or personalty above a certain value, limiting charges of fare on railroads, of toll on toll roads, and the rate of interest for which legal contract can be made. In fact, all matters necessary for the safety and well being of society to which public interest attaches, are, under the police power of the state, legitimate subjects for legislation.

Judge Cooley says:[6] "The state has also authority to make extensive and varied regulations as to the time, mode and circumstances in and under which parties shall assert, enjoy or exercise their rights, without coming in contact with any of the other constitutional principles which are established for the protection of private rights or private property." That such legislation can be so extended as to directly fix the price of labor in employments not connected with public interests, is not claimed, but the forms and terms of contract, may be substantially declared, and such provisions be required as will adjust prices from time to time.[7] Restrictions may be placed upon parties to such contracts, and their terms be made of such binding character, that many of the controversies, at least, now arising between employer and employe, can be averted.

The time may not have arrived for much legislation of the character suggested, and certainly no such legislation should be

[6] Cooley's Const. Lim., p. 745.

[7] 94 U. S. Sup. Ct.; 113.

hastily placed upon the statute books. The recent struggle, affecting disastrously this country from center to circumference, makes it evident that the time has come for careful intelligent search for a remedy. It is believed such investigation will show legislation along these lines of far greater practicability and promise than the establishment of more courts. The objection may be urged that such laws are too much in restraint of business, and the natural right of individuals to run their own affairs, and make their own contracts. Government and all laws are in restraint of the natural rights of the ungoverned and uncivilized. The surrender of certain natural rights is the price paid for law, order and civilization. Would not the security and stability derived from the fact that the law has defined the rights of the employer and employe, in their relations, more than offset rights surrendered by either?

We have powerful trusts and combinations that control and dictate prices for many of the necessary commodities of life, and restraint and regulation of such organizations by law is conceded by all to be desirable.

There are many labor organizations that fix the prices to be paid for skilled labor in numerous callings, and direct what persons shall be employed. These organizations do not always act oppressively, but we are compelled to submit to the dictation of interested, instead of disinterested parties. Some of our natural rights are taken from us, not by impartial law or officials, but by artificial organizations, through interested parties, organizations perhaps necessary under existing conditions. If this regulation and restraint were under the law, so far as practicable, and through established rules for each party interested, would there not be a much greater sense of security on the part of both labor and capital than is now felt, and less liability of violent outbreaks of any kind? The interests of capital and labor are mutual, and require amicable adjustment of differences. Each is liable to see only one side of the shield. Whatever makes most for peace, whether voluntary arbitration, or restrictive, regulating legislation for such contracts, best subserve, both public and private interests.

Perhaps a commission might be appointed by the governor or the legislature, with sufficient constructive wisdom to frame a plan which, adopted by the law-making power, and in its execu-

tion supervised by a non-partisan labor bureau, would remedy many of the existing evils.

These are mere suggestions thrown out. They are not presented as a well digested scheme or specific for strikes, or a substitute for arbitration, but in the hope that some wiser ones, by this, or some better way, may harmonize all interests involved in this great problem of the day.

Grand Rapids, Mich.

HISTORICAL COREA IN RELATION TO CHINA AND JAPAN.

TORAZO KIKUCHI.

The most casual reader of the newspapers of late must take great interest in the present troubles between China and Japan. It forms one of the most remarkable epochs in Asiatic history so little known to Europeans for the last several centuries. It will produce a great civilizing effect in the Chinese character, always so ignorant and barbaric, who will fight armed with bows and arrows in the latter part of the nineteenth contury; while it will further enlighten Japan, already so far advanced in social and political directions. The present trouble is the culmination of a historical feud between the two countries, which has lasted for several centuries. It will be difficult for me, however, to make clear the historical events which have caused the outbreak of open hostilities between the two countries. I will try and enumerate the most important of them.

First of all let me enumerate a few important facts about the kingdom of Corea, which has always been the "precious jewel" in Asia that has given Japan so much trouble to possess.

Corea is a peninsula extending in a south-eastern direction from the north-eastern part of China, and lies north-east of Japan. It has an area of 79,400 square miles, and a population of about nine millions.

The history of Corea bearing on the present war is of little importance up to about five hundred years ago. During the first part of the thirteenth century one of the northern tribes of Corea established a kingdom in the southern part of the peninsula. The kingdom was ruled over by a king name Lie, who was one of the ancestors of the present reigning king. After several years he distributed the members of his own family in such a manner that they ruled the whole peninsula. He soon found difficulty in protect ing his kingdom, lying as it did in close proximity and between the two large countries of China and Japan. It is said that he must have been a romantic politician, for in this emergency he tried a

political and diplomatic stratagem. He sent an ambassador to China with with the view of obtaining her protection on condition that Corea should become a territory, subject to Chinese sovereignty. This desired protection being granted he sent an ambassador to Japan to make the same overtures with regard to protection and promising the same conditions which he had given to China. His ambition was crowned with the success of which he dreamed, for he had thought to make Corea a paradise.

But whatever his dreams were they only served to get his successors into many difficulties with both countries, and it was finally decided that both should have their say in ruling it, or, in other words, Corea was to recognize the sovereignty of both China and Japan. But it must be seen that such an agreement must be very unsatisfactory to all three countries, and many difficulties arose which I will not take time to relate here. I will, however, mention the most important war, which was the very remarkable event in the history of Asia. It was called the "Bemroku uo Tatakai," which means "the war of Bemroku." This occurred in 1593, and was carried on by the Japanese against China and Corea under the leadership of Great General Toyotomi. It lasted about three years, but ended with the defeat of the Japanese forces, caused by the death of General Toyotomi.

The last two hundred and seventy years were passed in comparative peace because of the rule of Great General Tokugawa, during which time the emperor was without any power, while on the other side the dynasty of China was changed.

After this long sleep, about twenty-seven years ago, there was a small dispute between China and Japan which produced a great change in the conditions of both countries. A treaty was made, called "Saimochi-ura Geoyaku," and it made Corea an independent kingdom out of Chinese and Japanese rule. This was of great advantage to Corea although China made many unreasonable objections. Since then the Corean government has sent many students to Tokio, the capital of Japan, to become educated in all the modern sciences and literature, and partake of western civilization in which Japan was so rapidly advancing. The discontent and jealousy of China arose from year to year to the highest point. Several unreasonable questions with regard to Corea arose, but Japan never gave China any satisfaction.

Thirteen years ago a clash took place between the Chinese and Japanese forces in the legation at Seoul, the capital of Corea.

On the early morning of July 22, 1883, the Chinese troops, together with a mob of Coreans attacked the Japanese legation and garrison. The Japanese forces repulsed them with great loss to the Chinese. The fighting continued for about a week, when a new treaty was made called the "Tien-Tsin Treaty." The treaty was made with seventeen articles in all. I do not remember all of them. But I can say that one of the articles provided that the Corean kindom should be under the protection of both China and Japan, and another that in case each one of the countries should be under the necessity of sending an army to Corea, the fact must be reported at once to the other country and she would also send an army.

I must call attention to these articles of the treaty as they are the cause of the present trouble. I believe the reader now has a fair understanding of the history of Corea and the bearing it has upon the war.

I will now relate the event which led up to the outbreak of hostilities. Last spring Corea was involved in a rebellion of the people against governmental politics and the system of taxation. I had forgotten to say that there are two factions in the Corean government. These are the Japanese and Chinese parties. They are bitterly opposed to each other. When the government found itself unable to cope with this uprising, the Corean minister, Bin, one of the leaders of the Chinese party, invoked the aid of China through the Chinese minister to Corea. There is no doubt that this was the chance China had been looking for for a long while, and she was not slow in taking advantage of it. The Chinese government largely responded to the call for aid, and according to the Tien-Tsin Treaty, reported to Japan that she was going to send an army to "her own territory Corea" to put down the repellion, and she accordingly sent about thirteen hundred troops to Corea.

This discourteous report of the Chinese government was received with great excitement by the Japanese government and people. This attitude of China in assuming that Corea was her own territory greatly incensed Japan, and she refused it for the simple reason that Corea was an independent kingdom, and also sent over some troops according to the Tien-Tsin Treaty. I do not recollect just when this happened, but I believe it was in the latter part of April or the first part of May.

As it was generally believed neither country desired a peace-

ful settlement; and as the troops of both countries were assembled at Seoul, after a short battle the formal declarations of war were made by both governments. It was a matter of no surprise to the Japanese, as it was thought that open hostilities must occur sooner or later.

The reader of the press must be as familiar with the events that have happened since the sinking of the Chinece transport, Kow Shing, and several gunboats by Japanese ships, up to the present. I have no knowledge more than the readers about the present situations of both countries, as I have received no dispatches from home lately. Finally I will add that this trouble will have a very beneficent effect on China in the way of advancing Western civilization, and I have no doubt of it.

Ann Arbor, Mich.

NOTES.

STATE BAR ASSOCIATION COMMITTEES.—The Hon. M. V. Montgomery, president of the state Bar association, has appointed the following standing committees for the ensuing year:

Legislation and law reform.—Edward Cahill, George P. Wanty, Alfred Russell, Henry M. Duffield and George W. Weadock.

Legal education and admission to the bar—Claudius B. Grant, John W. Champlin, Edwin F. Conely, Charles H. Wisner and Dallas Boudeman.

ARBITRATION OF LABOR DIFFICULTIES.—The leading article in this number, by the Hon. Moses Taggart, upon "Arbitration of Labor Troubles," is a very fitting complement to the portion of Judge Cooley's admirable address devoted to that subject, published in the last number of the LAW JOURNAL. The similarity of their views is something of a coincidence, in view of the fact that both articles were written almost at the same time, and that neither knew the views of the other upon the subject. The blind advocates of arbitration as a remedy for labor difficulties will do well to read them carefully. How far arbitration can be carried, and to what questions it can be practically applied, under the state and federal constitutions, are the points to which Mr. Taggart confines his attention almost entirely; while Judge Cooley treats upon the blessings and short-comings of arbitration more in the abstract. To one expression used by the latter the *Chicago Legal Adviser* takes exception. It maintains that "compulsory arbitration" is a contradiction of terms, in which the second is "snuffed out by the first." It adds: "A once noted Illinois legislator emitted the wise observation, 'You cannot make a calf's tail a leg by statutory enactment.' So neither can you change the nature of arbitration by a statutory prefix of the word compulsory. Either arbitration is voluntary or it is not arbitration."[1]

TORAZO KIKUCHI ON THE JAPAN-CHINA DIFFICULTY.—The little Asiatic peninsula, Corea, has succeeded in drawing considerable attention to it of late. In fact the eyes of the world have become centered upon it. The press of this country are giving much of their space to chronicle the movements of the Oriental

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[1] Williamson v. Lacy, 29 Atl. Rep., 943.

powers in their unique dispute over the possession of this "bone of contention." For the public to fully understand the significance of this war—for it seems now to have assumed proportions which justify the use of that term—it will be necessary to study the historical facts which led up to the present difficulty. None are better able to explain these fully and truthfully than are some of the educated sons of the Orient who come to the colleges and universities of the United States to complete their education. The Japanese send many of their brightest sons here every year; and it is a matter of state pride that a large proportion of them come to the University of Michigan. Of the latter, one of the brightest and most energetic students is Mr. Torazo Kikuchi, who contributes the article "Historical Corea in Relation to China and Japan" to this number of the LAW JOURNAL. He is a graduate of the law department and is this year taking the post graduate course of study for the degree of Master of Laws.

LAWYERS AND THEIR INFLUENCE.—A paper on the "Influence of the Bar in Our State and Federal Government," by J. H. Benton, Jr., delivered before the New Hampshire Bar association, contains more statistical information regarding the influence of lawyers upon legislation than any work that has heretofore been called to our attention. He shows that the average membership of lawyers in both branches of congress from the beginning has been 53 per cent. In the house the average has been 49 per cent., and in the senate 66 per cent. In Michigan one in six of the legislature, and one in 460 of the population are members of the Bar. Of the 24 presidents of the United States, 19 have been lawyers. Of the 23 vice-presidents, 17 have been lawyers. Of the 232 cabinet officers, 218 have been lawyers. Of the 978 governors, whose business was ascertained, 578 were lawyers. When it is remembered that the judicial department of the government is made up entirely of lawyers, and that they make up a large per cent. of the executive and legislative branches, it is easy to get some idea of the predominating influence of the Bar in our government. This when considered from mere numerical strength; but at the head of all congressional committees, or leading every reform, are to be found members of the legal profession. They are the learned caste in this country, and their influence can hardly be over estimated. Those who single out a few disreputable members of the bar, and thereupon condemn the whole legal fraternity, should study the above figures carefully.

BRIBERY.—In a newspaper interview, the prosecuting attorney of Wayne county is quoted as saying that the law should be so

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[1] 34 Chi. Leg. Adv., 68.

amended as to exempt the person who offers the bribe, but to hold responsible the person bribed. Considered from one side, this would seem to make the business of bribery more dangerous, for as it is now the person accepting a bribe is protected against convicting testimony, inasmuch as the only witnesses against him generally would be the man who offered the bribe; and as the law makes him likewise guilty, he is equally interested in suppressing all evidence of the transaction. As a matter of fact the moral sense of the community looks with less abhorrence upon a man who spends money to obtain a contract, than upon a public officer who sells his vote. Were the law thus modified, it is to be feared that the evils which would follow would overwhelm any resulting good. Indiscriminate offers could be made, and consequently the temptations to accept bribes would be vastly increased. Most men, acting in a public capacity deal honestly when the motive for wrong doing is slight. Under present laws he who offers money to influence votes must do so at a risk, and observe the strictest secrecy; and when arrests are made under the charge of bribery, as in the case now pending in Detroit against four school inspectors, they serve as precedents to illustrate the danger of making the attempt, and serve as a warning to others. This is one of the greatest evils society has to contend against; an evil greatest in cities, but an evil everywhere, and whoever suggests an amendment to present laws which will prevent bribery, will be entitled to the lasting gratitude of society.

WORK FOR THE STATE BAR ASSOCIATION.—The Angust number of *Case and Comment* contains the following:

"'What good have I gotten out of it?' is the question which the MICHIGAN LAW JOURNAL reports as coming from a prominent lawyer on paying his belated annual dues to the state Bar association. Perhaps he has never heard about 'the duty which every lawyer owes to his profession,' or has seen it referred to only in the very virtuous preface of some hack-written law book as an ostensible reason for the existence of that creation. If, on the other hand, he does in fact recognize the obligation to his profession, which is a more agreeable supposition, he may have asked the question to test the utility of the association.

"For all the good results they show, some bar associations might be supposed to represent bar tenders instead of members of the bar. Yet, there are unmistakable signs of improvement and progress, and the intellectual vigor and public spirit of members of the bar are undoubtedly destined to accomplish much for the public welfare through the medium of such associations."

While it may not be truthfully said that the Bar association of this state has done any certain act of distinction, nor that it has, as yet, accomplished any great end, nevertheless it is encouraging to note that it manifests the "unmistakable signs of

improvement and progress," and that its members are beginning to show that they do possess the "intellectual vigor and public spirit" referred to. The last two or three annual meetings, though they have not been so largely attended as might have been wished, have been successful gatherings in many respects; and an increased interest in them has been manifested by the members. The papers read and addresses delivered, all of which have been heretofore published in full in the LAW JOURNAL, have all been interesting and instructive. The plans and suggestions made at the meetings, and the discussions thereon, though they have not thus far been fraught with any great or striking results, indicate that the members are not without thought as to the mission the association has to perform. It cannot be said of the Michigan Bar association that it "represents bar tenders." Neither could the same have been said of the waiters at any of its annual banquets. In fact, this luxury was entirely done away with at the last meeting, and it was instead, (as a prominent member and ex-justice of the supreme court expressed a hope it might be), "a feast of reason and a flow of the soul." It is to be hoped that the members will not forget all about what was done there until the next meeting, and then be reminded of it by further discussion of the same proposed reforms. If the bar association really accomplishes one-half the objects which were proposed at that meeting, its existence will have been more than justified. A list of the standing committees is given elsewhere. It is needless to say that President Montgomery has acted wisely in his selection of committees. It is to be hoped that they will refer again to the report of the proceedings at the last meeting, published in the June number of the LAW JOURNAL, and take steps at once to carry out some of the proposed reforms.

PURGE THE PROFESSION.—The members of the bar of Michigan have just cause to regret two occurrences within the past few weeks. But one of them should prove an example of what should be done as to the other, and one to be immediately followed. One is the disbarment of Elmer E. Smith, in the Allegan circuit court, and the other the conviction of Benj. DeVries, of the crime of forgery, before the superior court of Grand Rapids.

In the case of Smith, several charges against him were presented. The principal ones, and those which Judge Padgham deemed to have been clearly proven, were: (1) That he was a person whose reputation for truth and veracity was so notoriously bad that he could not be believed under oath, if he was in any way interested. (2) That he attempted to extort money from a jeweler of Otsego by telling the latter that he was attorney and reporter for the R. G. Dunn Co., and that if he would pay him he would report him favorably so that he could get credit, and if he did not pay him, he would so report him that he could not get credit. (3)

That he secured retainers from both parties to a certain contro versy.

Judge Padgham, in answer to a communication from the LAW JOURNAL, replied: "I decided that Smith had been guilty, under How. St., § 7179, of 'deceit' and 'malpractice' as contemplated by that statute, under the second and third charges. I found the first charge to have been sustained by an overwhelming preponderance of evidence; in fact there was no attempt to sustain him in this regard. Under How. St., § 7173, 'No person shall practice as an attorney or counsellor at law, or as a solicitor in chancery . . . unless he shall be appointed by the court for his good character and learning,' etc. I construed this statute as going a step beyond § 7179, and not restricted to questions of 'deceit' and 'mal. practice' in matters pertaining to the *business* or *profession* of the attorney; but that if it was a pre-requisite to the entry into the profession, that a man should have a good moral character, it was of greater need that he keep and possess such good character after he has once entered the profession. I did not consider that a man whose reputation for truth and veracity was so bad that he could not be believed under oath was a fit person to be entrusted with the delicate and responsible duties of an attorney. To hold out such a person to the puplic as deserving of confidence, would be a reproach to the profession and the court."

Pity it is that all circuit judges are not like Judge Padgham, or that the members of the bar of all circuits are not as alive to their duties and responsibilities as are those who brought his case to light and prosecuted it to a determination. We sympathize with Mr. Smith, and regret that he has so far forgotten his oath of office as an attorney as to bring discredit upon the profession. The reputable members of the bar should not, however, in their natural sympathy for those who allow themselves to be swayed from the paths of right and professional duty, add greater discredit to the profession by calmly allowing those guilty of such violations of their solemn oaths to remain as members in good standing.

The bar of Kent county should not be slow in following the example set them by their Allegan brothers. Mr. DeVries has been convicted of one of the worst of crimes from a professional standpoint—forgery. He has been sentenced to prison for eight years, after a fair trial. It is unfortunate that the statute does not make the conviction of such a felony ground for disbarment *per se*, so that a formal motion would be the only thing required to complete it. Inasmuch as it does not, no time should be lost in bringing formal charges. Give him the hearing to which he is entitled, and unless he can yet clear himself of the charge of which a jury of his peers has found him guilty, strike his name from the rolls it will then have been clearly shown to be a blot upon. Purge the profession.

RIGHT OF A MURDERER TO INHERIT THE PROPERTY OF HIS VICTIM.—Whether or not a presumptive heir, who murders the one from whom he expets to inherit, is entitled to thereby come into possession of the property of his victim, is a question with which the courts have more than once had to deal, but which, until recently has been quite unsettled. There is no question as to the right of the legislature to declare such an act to operate as a forfeiture of all rights of inheritance; but in the absence of such a statutory provision the question arises. Several years ago a case in which this point was involved was before the probate court of Kent county, in this state. On July 16, 1882, Daniel Goggins killed his wife in the city of Grand Rapids. He was arrested, and assigned his interest in his wife's estate to secure money to conduct his defense. He was found guilty, and on Sept. 23, of the same year, sentenced to prison. In the distribution of the estate of Mrs. Goggins, on final settlement, Goggins' assignee was given his share of the estate. No appeal from this action was ever taken, so the case never went to a higher court. A contrary rule has become well established in New York. In *Riggs v. Palmer*[1] it was held that one who had made himself an heir by such a crime could take no interest in the estate. In that case a boy sixteen years old, who had been made the principal devisee in the will of his grandfather, sought to prevent a possible change of mind and to secure the immediate possession of the property by murdering the testator. The court in their decision relied to considerable extent upon *N. Y. Mut. Life Ins. Co. v. Armstrong*.[2] In doing so they were clearly in error. The latter case was where a person had taken out an insurance policy upon the life of another payable at his death, and then murdered the assured to make the policy payable. It was very properly held that he could not recover. The liability in such a case rested upon contract, which fraud clearly vitiates. There is very little analogy between the two classes of cases. The English courts have arrived at the same conclusion. In *Cleaver v. Life Association*[3] it was held that a wife who had murdered her husband after he had taken out a policy of life insurance payable to her could not recover. One of the principal reasons given for the court's decision was, however, that to permit a recovery under such circumstances would be against public policy. In *Owens v. Owens*,[4] it was held that a widow convicted of being an accessory before the fact for the murder of her husband was nevertheless entitled to recover in a suit to have her dower in her husband's property assigned, however repugnant it might be to the sense of propriety and justice, for the reason that the law gave it to her in unqualified terms, there being no statutory provision to make the commission of such a crime operate as a forfeiture.

[1] 115 N. Y., 506; 22 N. E., 188.
[2] 117 U. S., 599; 6 Sup. Ct. Rep., 877.
[3] Q. B., 44 Alb. Law Jour., 382.
[4] 100 N. C., 240; S. E. Rep., 794.

In *Deem v. Resinger*,[5] a case before the circuit court of Preble county, Ohio, mortgagees of a son who had murdered his mother and subsequently been hanged for his crime, were permitted to hold the real estate of the mother in preference to her brothers and sisters, who claimed that the son had by his crime deprived himself of all rights in her estate. The trial judge said; "The statute neither recognizes a mischief nor provides a remedy. It is a legislative declaration of a rule of public policy. . . . But the rule affords no warrant for adding an important exception to a statute which, in clear language, defines a rule of public policy. . . . The well considered cases warrant the pertinent conclusion that when the legislature, not transcending the limit of its powers, speaks in clear language upon a question of policy, it becomes the judicial tribunal to remain silent."[6] The court quoted with approval the observation of Chief Justice Redfield in *Re Powers*:[7] "It is scarcely necessary, we think, at this late day, to say that the judicial tribunals of the state have no concern with the policy of legislation."

After this brief reference to these cases, the wisdom of the latest decision upon the subject will more clearly appear. In *Shellenger v. Ransom*,[8] a case decided at the last term of the Nebraska supreme court, the court in an exhaustive and well considered opinion, reversed a former decision of that court in the same case, and held that an assignment by a father, who had murdered his daughter, of whom he was the presumptive heir, of certain interests in land which he took as his victim's heir, was valid and effectual. In this case, as in *Re Goggins*, before the probate court of Kent county, above referred to, the assignment had been made for the purpose of securing his attorneys for defending him of the crime for which he was subsequently convicted and executed.

The question therefore seems now to have been settled, and settled rightly, in view of the present legislation upon the subject. Unquestionably it is generally regretted that such is the law. It is but one of the few cases to cover which legislation has not yet reached out far enough. The remedy should follow the discovery of the defect. The civil law contained a provision especially disqualifying a murderer from taking property by inheritance or will from his victim. The courts have but done their duty. It now remains for the several legislatures to do theirs.

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[5] 34 Cent. Law J., 247; 27 Cin. Law Bul., 156. 28 Ohio Law J., 357.

[6] See Plank Road Co. v. Woodhull, 25 Mich, 99; Hadden v. Collector, 5 Wall., 107; Hyatt v, Taylor, 42 N. Y., 258; In re Powers, 25 Vt., 625; Jewell v. Weed, 18 Minn., 272; State v. Liedtke, 9 Neb., 468, 4 N. W. Rep., 61; Kent v. Mahaffy, 10 Ohio St., 204; Woodbury v. Berry, 18 Ohio St., 456; Bruner v. Briggs, 39 Ohio St., 478.

[7] Supra, 25 Vt., 625.

[8] 11 N. Y. Law J., 1397, (Sept. 18.)

LAW SCHOOL NOTES.

E. F. JOHNSON, EDITOR.

Professor Mechem will use Reeves' Leading Cases on Wills, with a supplement of additional cases, in connection with his lectures on that subject this year; and Paige's Cases in Partnership, with his lectures on that subject to the juniors.

The lengthening of the under-graduate course to three years, which takes effect in 1895, and the raising of the standard for admission which takes effect in 1896, will undoubtedly meet with the hearty approval of the many friends of the department, who are all interested in seeing it keep its true place as the leading law school of the land.

Messrs. Hughes and Dwyer, who did much efficient work in the department last year, have been promoted to the rank of instructors for the coming year. The force in this branch of the work has been increased by the appointment of Mr. Walter Denton Smith, of Detroit, as instructor. Mr. Smith was formerly a student in this department, was one of the founders of the Detroit College of Law, and is the author of "Smith's Elementary Law," just published by the West Publishing Company, of St. Paul.

During the past summer the various members of the resident faculty have been engaged, daily, in our splendid library, making some special investigation and preparation, for the year's work. The only change made in the faculty of last year is the election of the Hon. Thomas A. Bogle, to take charge of the practice court as hereinfter noted. The work of Professor Mechem, who had charge of this work during the past year, was eminently satisfactory; but it was believed that he could be of greater value to the mass of students in other lines of investigation.

The post-graduate course has been materially strengthened for the coming year. Five new subjects have been added: Roman Law, Judicial Sales, Taxation, Damages, and Suretyship and Mortgages. The work on Roman Law will be under the charge of Mr. C. L. Meader, of the literary department, where his work in the same field has attracted much attention. He will use Hammond's Justinian as the basis of the work, which will be adapted to the student who does not read Latin as well as to those who read the original text. This work will unquestionably prove of great value. Dean Knowlton will have charge of the subject of Judicial Sales, Professor Thompson, of Suretyship and Mortgages, and Professor Mechem, of Taxation and Damages. The latter subject will be given to the seniors as well. These subjects are all of importance and will add greatly to the value of the course. Quite a number of the class of '94 are returning to

take the course. It is proving to be a great success, and the number who take advantage of it is constantly increasing.

The success of the practice court which was established last year, and conducted during the second semester, was such as to induce the regents to enlarge its scope and usefulness for the coming year. Instead of being limited to the second semester, it will extend throughout the year. Owing to the inability of Professor Mechem to give his entire time to this work, it was decided to create a new professorship—a chair of practice—and Mr. Thomas A. Bogle has been appointed to the place. Professor Bogle's appointment promises to be a happy one. Heretofore there has been no member of the faculty who had had experience in code pleading and practice, and this form of procedure now prevails substantially in all of the western states, from which so many of the students come. Professor Bogle, however, has had eight years of active and extensive practice in Kansas. and has also practiced for several years in Michigan, thus gaining a valuable experience under both systems. He has also made the subject of pleading under both systems a matter of special study, and is therefore unusually well equipped for his new work. During his practice in Kansas he held the office of county attorney for two terms. Professor Bogle is no novice in educational work, as he was for several years a successful teacher and superintendent, and is heartily in sympathy with young men and their needs. Like so many of the successful lawyers of the West, he is a graduate of the department in which he is now to become a professor.

The work to be done will be substantially along the lines laid down last year, though more time will be given to pleading than was then possible, owing to the fact that but half a year could be devoted to the work. There will be two courses of cases. The first will be based upon given statements of fact, prepared and assigned by the faculty, upon which the students will be required to select the proper forum and form of action, issue and serve the appropriate process, and plead to an issue. When an issue is reached upon the pleading, a public hearing will be had at which the pleadings will be criticised and revised, until they are satisfactory. When this part of the work has been approved, the questions of law arising upon the facts will be "briefed up" and argued before some member of the faculty.

The second course will consist chiefly of jury trials, about seventy-five in number, arising out of actual controversies, and conducted by the students through all the phases of a contested trial by jury. Mr. Evan L. Evans, of Corunna, of the class of '95, has been appointed clerk. Mr. Evans has acted as deputy clerk in his home circuit, and his experience will stand him in good service here. The clerk's office will be well supplied with appropriate books and the blanks in common use in the several states. Care is also being taken to provide the library with the leading works of practice for the several states, and the student will thus be able to acquire, not merely a theoretical knowledge of practice generally, but a practical knowledge of it as actually conducted in his own state, and will be made familiar with the forms and authorities there in daily use. When the careful training in common law, equity, criminal and code pleading given by Professors Griffin, Thompson and Johnson, is supplemented by the equally careful training in actual practice, it would seem that all that can be done for a student in this field will have been supplied. The enthusiasm and interest manifested by the students last year is sufficient evidence that they appreciate the exceptional facilities here afforded them

BOOK REVIEWS.

SHIPMAN'S COMMON-LAW PLEADING—A Hand-Book of Common Law Pleading. By BENJAMIN J. SHIPMAN. St. Paul: West Publishing Co. 1 vol., 8vo. 370 pp. $3.75.

This is the third volume of the series of handbooks, known as the "Hornbook Series," being published by the St. Paul company. It is uniform in size, style of arrangement, and price, with the volumes of the series already issued. This series is essentially a student series. That does not imply that the volumes put forth are of value only to students in law schools and law offices. The learned practitioner, whose work and thoughts have been confined within certain lines, not unfrequently finds himself confronted with questions with which he has not for some time had to deal, or with subjects upon which he has become "rusty." He then becomes a student, and will appreciate this series as much as any other. It has not been claimed as a paramount feature that the works of the series possess a great amount of originality of subject matter. It is in the manner of arrangement and the judicious elimination of unessentials that they excel. It is true that the first volume has met with some criticism upon the ground that it follows too closely the work of other writers upon the subject. This criticism will not be made upon Mr. Shipman's work. Every one realizes that a work upon common-law pleading depends, in great part, for its usefulness, upon the amount of useless verbiage and obsolete rules and principles which it omits. The author frankly admits that the arrangement is mainly that of Mr. Stephen, and that the rules given are those found in his well known kook. Certainly he has shown good sense in thus following the old saw "let well enough alone." Modern typographical arrangement has done much to make the study of law books a pleasure rather than a task, and to enable the student to sift the grain from the tares. This art of the publishers has been thoroughly exercised in the preparation of this work.

BROWNE'S KENT'S COMMENTARIES.—Commentaries on American Law, by James Kent, LL. D., Chancellor of the State of New York. Edited by WM. HARDCASTLE BROWNE, A. M., of the Philadelphia Bar, author of an edition of Blackstone's Commentaries; also of a Commentary on the Law of Divorce and Alimony, etc. St. Paul: West Publishing Co. One vol., 8 vo. 926 pp. $5.30.

Whether the student of the law should begin his study by reading Blackstone or Kent is a much disputed question. The covers to Blackstone's Commentaries have long been regarded by many as the only gate through which one might properly enter the field of the law. Other equally thoughtful men of the profession have been equally strong in their opinion that the commentaries of Chancellor Kent on "American Law" should be the first book placed in the hands of the student. The student. The latter seems to be the growing sentiment. The great drawback has been that the editions of Kent have been so cumbered with notes and abstract discussions, which, while they have proven of inestimable

value to the older members of the bar, have but served to confuse the student. Had he but known which portions to have omitted, doubtless many a dreary headache would have been averted. This difficulty Mr. Browne has solved for the benefit of future beginners. In one volume of 890 pages he has condensed all that is essential of Kent. We say all; that may possibly be putting it too strongly. It would hardly be possible for one man to perform such a task without leaving out something which another would deem essential, or inserting that which the other would have omitted. But in doing this it must be admitted that Mr. Browne has been remarkably successful. Throughout the book are the evidences of great care and conscientious work in its preparation. It is a very handsomely bound volume, convenient in size, and printed in very plain type. The system of prefatory black-letter catch words to each paragraph, throughout the work, assists materially in the reading and proper understanding of the text, and serves to fix the principles in mind. Certainly Kent's Commentaries were never before published in so convenient a form at such a low price.

GIAUQUE AND MCCLURE'S PRESENT VALUE TABLES.—Tables for Ascertaining the Present Value of Vested and Contingent Rights of Dower, Curtesy, Annuities and other Life Estates, etc., by FLORIEN GIAUQUE, A. M., author of "Settlement of Decedent's Estates," etc., and HENRY B. MCCLURE, A. M., of the Cincinnati Bar. Cincinnati: The Robert Clarke Company. 1 vol., 8 vo. 200 pp. $3.00.

This work is in one sense a new edition of the "Dower and Curtesy Tables," compiled by the same authors ten or twelve years ago. So many changes have been made and so much additional matter has been added that it is virtually an entirely new work, and is published as such. It begins with a brief reference to the history and development of the use of tables of mortality, annuity, etc. Full and complete tables for ascertaining the present value of vested dower and curtesy, also of contingent rights of dower and curtesy, and other life estates which begin after the death of one or two joint lives, are then given. To these are added tables showing the expectancy of life, based on several standard tables of mortalty, used to aid in ascertaining damages for death or injury by wrongful acts, negligence or default; also tables for ascertaining the present value of any sum, at various rates per cent. for any number of years. In examining a work of this kind one cannot but be impressed with the amount of work which must necessarily be involved in its preparation. To compile such a large number of tables, containing so many columns of figures, without making error is no ordinary task; and there is every indication that the compilers of this work have succeeded in so doing. A statement something in the nature of an apology for the price asked for the work is given in the preface, comparing it with other books whose contents are largely tables of figures. This seems entirely unnecessary. The price is certainly reasonable. The book must necessarily have a limited sale; but to those who have need for it, it will be worth many times the cost.

BLISS ON CODE PLEADING.—A Treatise upon the Law of Pleading under the Codes of Civil Procedure, etc., by PHILEMON BLISS, LL.D., Professor of Law in the Missouri State University, and late Judge of the Supreme Court of Missouri. Third Edition Revised and Annotated by E. F. JOHNSON, B. S., LL.M., Instructor of Law in the University of Michigan. St. Paul: West Publishing Co. 1 Vol., 8vo. 809 pp. $6.00 net.

The LAW JOURNAL has been a consistent advocate of the adoption of

a code of civil procedure in Michigan. Several articles and communications upon both sides of the question have been published in preceeding numbers. While no marked results have come of it, yet we do not deem the space used to have been wasted, by any means. So long as the members of the bar and the citizens generally continue to discuss and agitate the question, the law reformers have no reason to be discouraged. Some of the papers read at the last meeting of the state Bar association, and the discussion thereon, show that public sentiment is leading in that direction, and that law reform is not an impossible thing of the future. To those interested in the subject, and that should include every progressive lawyer in the state, we would recommend a careful study of this edition of this standard work upon code pleading. It is conceded that no work upon the subject has ever excelled that of Professor Bliss; and no one is better qualified to edit and modernize it than Professor Johnson. The experience of the latter as instructor of that subject has given him a most thorough knowledge of it, and afforded him an opportunity to discover the inefficiencies of the former edition. Such few mistakes or deficiencies as could be found have been rectified and supplied in this edition. Professor Johnson has added some very valuable explanatory notes which will assist materially in the understanding of the subject. The leading cases to which particular attention is called form a valuable feature. The text, while substantially preserved, has been put in far better form for rapid reading and quick understanding by the insertion of a short and terse statement of the principles contained in a paragraph, printed in black type, in a separate sentence immediately preceeding the paragraph. He has also added quite a number of well drawn forms, a notable deficiency of the former editions of the work. He has also added an entire new chapter upon "Extraordinary Legal Remedies." The table of contents, list of cases cited, and the index seem to be all complete. As a law school text book, for which it seems to have been especially designed, it will no doubt supersede all other works on the subject.

AMERICAN ELECTRICAL CASES. VOL. I.—A Collection of All the Important Cases (excepting Patent Cases) Decided in the State and Federal Courts of the United States from 1873 on subjects relating to the Telegraph, the Telephone, Electric Light and Power, and Other Practical Uses of Electricity, with Annotations. Edited by WILLIAM W. MERRILL; Author of "Competency and Privilege of Witnesses," etc. Vol. I. 1873–1885. Albany: Matthew Bender. 894 pp. $6.60.

The present era has come to be universally regarded as the "Age of Electricity." Time was, when an inventor began to talk of some proposed invention to utilize the mysterious power of electricity, that people would look at him compassionately with the mental observation that he had more wheels in his head than would be run by his "machine." Things have changed now. No one is any longer skeptical about the power of electricity, and few dare to contemplate its possibilities. It will be readily realized that the rapid development of this new power must necessarily give rise to a large amount of a new class of litigation. More than one good lawyer has turned his entire attention and study to this one subject, and become a specialist in what has now become a well developed branch of the law. The value and necessity of such a series of reports is therefore apparent. There has been no attempt to collect the decisions on the subject since the publication of "Allen's Telegraph Cases," in 1873. In

that volume, which contained every case which could be found at that time, was reported but eighty-one cases. The present volume, covering a period of thirteen years, contains complete reports of one hundred and fifty-five cases, and memoranda of thirty or more additional cases in the notes. It is said that the second volume of these reports will cover a period of three years and contain about the same number of cases. The succeeding volumes will be issued as fast as the decisions accumulate, which it is thought will soon be at the rate of a volume a year. The mechanical construction of the book is all that could be asked. Both the editor and the publisher have performed their work well. This will no doubt in time be one of the most valuable and standard series of reports.

CURRENT LITERATURE.

The Illustrated American for September 15 contains an illustrated article upon "The United States in Korea" by Eustace B. Rogers of the U. S. Navy. An illustration of Secretary Hoke Smith at his desk, with a short sketch of his life, is given in the same number. (New York: Lorillard Spencer. Weekly, 10 cents. $4.00 a year.)

In *Little's Living Age* are reproduced in full the more valuable articles of the Foreign magazines. Each weekly issue contains sixty-four pages. The issue of Sept. 8 contains the article of the Right Hon. W. E. Gladstone on "The Place of Heresy and Schism in the Modern Christian Church." (Boston: Littell & Co., Weekly, 18 cents. $8.00 per year.)

Public Opinion continues to occupy its great field of usefulness, and to hold its high position in the esteem of its readers. Every weekly issue is "up to date." Scarcely an event of any importance escapes its editorial horoscope. Its excerpts cover a wide range, including American and Foreign affairs, and sociology, finance, commerce science, religion, education, art, literature and miscellany. (Washington and New York: The Public Opinion Co. Weekly, 6 cents. $2.50 per year.)

In the October *Atlantic* a paper of rare historical value is the Hon. Henry L. Dawes's "Recollections of Stanton under Johnson." It presents an intimate inside view of a period of government life at Washington which of course was quite without parallel, and can never lose its interest and significance. Mr. Henry J. Fletcher, whose article on American Railways and Cities, a few months ago, attracted no little attention, contributes a suggestive consideration of "The Railway War" in a tone not wholly inimical to Mr. Debs and his followers. "The Retrospect of an Octogennarian," by the Rev. Dr. George E. Ellis, is one of the other interesting features of this number. (Boston: Hougton, Mifflin & Co. 35 cents.)

In the *North American Review* for October, the "Issues of the Coming Election" are ably discussed by the Hon. William L. Wilson and the Hon. Thomas B. Reed. A timely article upon "The Peril of the Treasury" is contributed by the Hon. George A. Boutwell. Other interesting articles are: "The Municipal Problems of London," by the Lord Mayor of London; "The Catholic Church and the Saloon," by the Most Rev. Archbishop Ireland; "Astronomy and Religion," by Sir Edwin Arnold; "The Transatlantic Mails," by J. Henniker Heaton, M. P.; "How Shall the Indians be Educated?" by Senator James H. Kyle, and "The Renaissance of Woman," by Lady Henry Somerset. (New York: North American Review. 50 cents.)

The *Review of Reviews* for September gives surveys of recent congressional and state legislation in special articles. The new tariff law receives careful and impartial treatment. The tortuous course of the bill in congress is retraced by the editor in the "Progress of the World" department, and a table is given showing, for purposes of comparison, the tariff rates on important articles under the McKinley act and the new law, respectively. "Political Japan and its Leaders," by C. Meriwether, "The New Hawaiian Constitution," by Albert Shaw, and "New Ideas in Taxation," by the Hon. F. W. Holder, are some of the more interesting of the others features of that number. (New York: The Review of Reviews. 25 cents.)

"Reasons why the Republic May Endure," by President C. W. Elliott, is the leading article in the October number of *The Forum*. Professor Richard T. Ely defends himself in an article, "Fundamental Beliefs in My Social Philosophy," and is criticised by Professor Arthur T. Hadley in "Ely's 'Socialism and Social Reform.'" These

two papers are of particular interest just at this time. "Can Railroad Rates be Cheapened?" "Is the British Empire Stable?" and "Has Oratory Declined?" are three questions asked and answered, respectively by Harry T. Newcomb, T. Heinrich Geffchen and the Hon. Henry L. Dawes. Among the several other interesting articles is one upon the "Significance of the Japan-China War," by Michitaro Hiso. (New York: The Forum Publishing Co. 25 cents.)

The American Journal of Politics has been reduced from thirty-five to twenty-five cents, for single numbers. The value of its contents has not been lessened, as will appear from the following table of contents of the October number. "Anarchical Elements in Society," William Ferrero; "A Criticism of Henry George's Single Tax Theory," Arthur Kitson; "The Law of Service," W. E. Brokaw; "Popular Government: its Development and Failure in Antiquity," Dr. Adolph Moses; "Pullman and Its Real Lessons," J. W. Mason; "Our Silver Experiment," Edwin Mead; "The Foreign Policy of Japan," Ernest W. Clement; "Woman Suffrage," Atkinson Schaumburg; "Our Misleading Census Statistics," H. L. Bliss; "Economic Co-operation—A Reply," Stoughton Cooley. (New York: Andrew J. Palm & Co. 25 cents.)

The September *Popular Science Monthly* contains a most interesting illustrated article by Ernest A. Le Sueur, "Commercial Power Development at Niagara," describing the great engineering project on foot at Niagara Falls, looking to the development of a part of the water power at present running to waste, over the gigantic cataract. It is proposed to harness the falls to a great dynamo, and transmit the power to great manufactories in surrounding cities. It is expected also that much of the power will be used by various manufacturing enterprises which are moving to Niagara. He predicts that it will eventually become the foremost power consuming center in the world. Prof. James Sully contributes the second of his "Studies of Childhood." Dr. H. E. Armstrong writes on "Scientific Education;" Prof. E. P. Evans, on "Ethical Relations between Man and Beast," and Floyd Davis on "Science as a Means of Human Culture." (New York: D. Appleton & Co. 50 cents.)

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THE COURTS OF JUDEA.

The study of Jewish jurisprudence has become interesting during the past ten years through the efforts of some painstaking scholars, who have not been burdened with any particular dogma, but have been actuated by a true Christian spirit. They have been close students of those portions of the Talmud which throw light on the jurisprudence of the Jews.*

We understand the meaning of the following terms: The Legislature, the Court, the City Council, the Board of Supervisors, the Township Board and the School Board. Which one of these fairly represents the Jewish Shanhedrim? Not any one of them. But if you can coin an English word which shall express the powers and duties of all of these municipal bodies imposed upon one, you may be able to correctly define the Sanhedrim in Judea. It was an authorized body of men, possessing political, legislative, judicial, municipal, religious, and educational functions. Its most important duties, however, were judicial.

The courts of Judea, established for the administration of justice, were of three kinds. First, the local or petty court of three, known as the inferior Sanhedrim, which sat in the smaller village communities. Second. the provincial Sanhedrim. with twenty-three members, the judicial tribunal of the larger towns and provinces. Third, the great Sanhedrim, which sat at Jerusalem and consisted of seventy-one of the most eminent judges of the country. Let us consider the jurisdiction of these several courts in their order, commencing with the inferior Sanhedrim.

The Local Sanhedrim of the Village.—This was not a permanent, but a temporary tribunal, which exercised authority whenever called upon. It had jurisdiction over civil cases and petty offences, now known as misdemeanors. It might inflict and enforce a pecuniary penalty for some infraction of the law, but had no jurisdiction in capital cases. This local court, or town board, of three persons, in its judicial powers, was not materially unlike the justice court of to-day.

The judges of this court were selected by a very simple process. The

*Mendelsohn's "Criminal Jurisprudence of the Ancient Hebrews." Lemman's "Jesus before the Sanhedrim." Benney's "Criminal Code of the Jews."

complaining party in a civil case named a judge, the defendant named one, and the two thus chosen named a third. The three heard the case and rendered judgment. This was, in fact, a court of arbitration. We may well say that the arbitrating of differences is not a fruit of modern civilization. It was tacitly understood that one member of the court of three should be a rabbi, some one learned in the law, and a student of Jewish institutions will readily understand that by custom the same persons were chosen in each case and were recognized as the judges of the village. It seems that this local court possessed not only judicial, but also municipal and semi-religious functions.

The Provincial Sanhedrim.—Above this petty court, was the provincial Sanhedrim, a tribunal of great judicial power and influence, composed of twenty-three judges selected by the people of the town or province, under authority of the great Sanhedrim at Jerusalem. Any town of 120 families was entitled to a provincial court. To such a town, the great Sanhedrim sent its mandate, commanding the people to nominate from their inhabitants twenty-three judges, who were required to be "learned, and modest, and popular." This command was observed by the people, who assembled and at an informal but public election named the judges. A report of the proceedings was returned to Jerusalem, and, if the great Sanhedrim approved, authority was given the judges, constituting them a provincial court.

We observe that the people only nominated their judges, and the great council might or might not confirm the nomination. In fact, the right of a provincial court to exist at all depended upon the discretion of the center of judicial power, seated at Jerusalem. Unless the people of a town selected for judges their best men, the authority to hold a court was refused. The reason for this we shall easily understand when we come to observe that the membership of the great Sanhedrim was recruited from the provincial courts of the larger towns.. It was of the highest importance that the people should name the most learned and influential as judges in the provincial court, for some day one or more of them might be called to a seat in the great Sanhedrim.

This provincial court, once established, was possessed of original and general jurisdiction. Before it were tried men accused of crimes involving, (*a*) capital punishment, (*b*) confinement in a city of refuge, (*c*) imprisonment or seclusion for life. Hence, they took jurisdiction of cases of felonous homicide, blasphemy, adultery and incest, and of many other crimes entailing corporal punishment. This tribunal might also put a beast on trial. If a bull should gore to death a citizen, the beast might be tried, condemned and executed for his crime. In its general jurisdiction, the provincial court was not unlike our district or circuit court. It It also exercised many important municipal functions. We shall not be far from the truth if we say that the provincial Sanhedrim peformed the

duties now imposed on our Board of Supervisors, City Council, Board of Health, and School Board. It was a body possessing general judicial and administrative powers.

On Mondays and Thursdays of each week, the people gathered at the synagogue. Inasmuch as on these days the suitors were necessarily brought together, they became the regular court days. Sittings were held on other days, as occasion might require, and in the larger towns the court was probably in session from day to day throughout the year, excluding, of course, Saturday.

The session hours were in the morning on account of the heat. A trial commenced before noon might proceed through the day, and might, except in a capital case, continue after night-fall. The court held its sessions usually in the open air and at the city gate, the most public place, in obediedce to this command in Dieuteronomy: "Judges and offices shalt thou make in all thy gates, which the Lord, thy God, giveth thee." The courts of Jerusalem, however, sat at the gates in the temple.

We may inquire what were the qualifications for judicial preferment, and what would disqualify one from sitting as a judge. The positive requirements were numerous. We will name a few only. The Talmud prescribes that all judges "ought to have seven qualifications; wisdom, gentleness, piety, hatred of mammon, love of truth, they should be loved of men, and be of good repute." They were not allowed to seek the office. Who became judge through office-seeking was despised by his associates. First of all, he was required to be a Jew of pure Israelitish descent, thoroughly versed in the written and unwritten law, familiar with many languages, for interpreters were not allowed in court, also a man of experience, but not too old, lest he might be too severe, and a man of family, that he might be admonished by paternal feeling. Possessing all these qualifications, he might still be disqualified. One who played at games of chance for money, or who had not learned a trade by which he earned his living, or who loaned money upon usury, could not be a judge. Any judge who was any way, directly or indirectly, interested in a case or related to one of the parties in any degree of consanguinity or affinity, could not sit at the hearing. In a word, a judge was required to be an amiable gentleman, of great learning, of impressive personal appearance and commanding character. This was the theory of the law, but in Christ's time the commonwealth was passing away rapidly. The period of decay and dissolution had set in, and this excellent theory was not always put to practice.

The Courts at Jerusalem.—The center of the earth, supposed to be at Jerusalem, was under the jurisdiction of three courts, two ordinary courts, called the first and second ordinary, and the great Sanhedrim, which was the great council of the nation.

An ordinary, like the provincial court, consisted of twenty-three

judges, and had similar jurisdiction over crimes. The first ordinary held its sessions at the foot of the Temple Mount, the second ordinary sat at the court of the women in the Temple.

The membership of these ordinary Sanhedrims of Jerusalem was recruited in this novel way. A vacancy occurring in the second was filled by calling up some member of the first, and a vacancy in the first was filled by some prominent member of the provincial court already described, and we may add in this connection that the membership of the great Sanhedrim was recruited from the second ordinary court, which sat at the Court of the Women in the Temple. Thus by promotion a citizen rose to the highest rank in the civil service. He might start as one of the seven men of the synagogue, who read and interpreted the Law, then become one of the triumvirs of the village, that local court having jurisdiction over petty offenses, then he might be elected to the provincial Sanhedrim, then by promation he might pass to the first ordinary at Jerusalem, thence to the second ordinary, and finally to a seat in the Great Council of the nation. We of to-day are prepared to concede that this system of selecting judges ought to have filled the courts of Judea with very able jurists.

The Great Sanhedrim.—This historic body sat at Jerusalem in the Temple. It consisted of seventy-one members. The High Priest was the presiding officer of this body. About this, however, there has been some dispute, but certain it is that in the time of Christ the High Priest, Caiaphas, was President of the Sanhedrim. This was the supreme council of the nation. It possessed all the legislative, administrative and judicial powers of the state. We are interested only in its judicial powers.

First. It was a court of appeal, to which were referred questions which might arise in the lower courts. The right of appeal in contested cases was carefully regulated. Supposing a question arose in a provincial Sanhedrim, which the twenty-three judges could not decide because they were not sufficiently learned in the law. The case was referred to some other provincial Sanhedrim of greater repute. If here a precedent was found decisive of the issue, the case was ended, but if no satisfactory precedent was known to these judges, then the case was carried to the first ordinary, then to the second ordinary, at Jerusalem, and if the case still stood without precedent, it was carried to the Great Sanhedrim, where judgment was rendered according to equity and good conscience. and a precedent was thus established for the guidance of the lower courts, and which they were never allowed to question. To dispute or depart from the judgments of this great council was the highest crime in Jewish jurisprudence. It was high treason and punished with death. Thus we observe that case-made law was highly developed in Judea, and that the principle *stare decisis* controlled her courts.

Second. The Great Sanhedrim had original and exclusive jurisdic-

tion over certain crimes. In case a city or a tribe was charged with paganism, or any individual was to be condemned as a false prophet, or an accusation was made against a High Priest, or if persons were to be exiled, all these questions were under the exclusive jurisdiction of the Great Sanhedrim. The lower courts had nothing to do with them. This High Court established and had general supervision over the lower courts of which we have spoken.

The judges of all the courts were expected to perform their judicial duties without compensation. This they were required to do on the regular court days, Mondays and Thursdays. On other days they earned a living at their trade. If asked, by reason of press of business, to serve on other days, they were compensated out of the common treasury or by fees from litigants, but the parties to the case were required to contribute equally. The rabbis insisted that no man should give his whole time to judicial work, unless he possessed a fortune and was independent of temptation to receive money for his judgments. It was said that as Moses sat in judgment without expectation of material reward, but for the sake of duty, so must every judge act for the sake of justice only. The taking of legal fees by the magistrate was severely condemned, and justly.

At the present time, the judicial system of Michigan is open to criticism by reason of its legal fees in justice courts. They often tempt unscrupulous magistrates to most shameful practices. No man should be allowed to sit in judgment in any case where his decision, or even the fact that a case is or is not commenced, could directly or indirectly affect his financial returns. Magistrates ought not to be rewarded according to the number of cases that may have been commenced in their courts. This provokes senseless and petty litigation. Greater good will come to the public from salaried positions.

The Jews were exceedingly severe in their condemnation of all forms of judicial bribery. The more careful judges would not accept ordinary civilities from litigants. It is related that a rabbi crossing a river brought his boat near shore, and a stranger assisted him to land safely. Soon thereafter, the stranger appeared as a litigant before the tribunal where the rabbi sat. He declined to hear the case. The more conscientious judges would not sit in a case unless they could decide without fear or favor. Their conduct was not governed simply by technical rules of consanguinity and affinity.. They would not judge the rights of a friend or an enemy. Whatever we may think of Jewish institutions, we must concede that her courts were fixed on a sound basis and under a system calculated to bring to the bench the wisdom and the learning of the state, men of great intellectual attainments, of sterling common sense. It matters not that we see in Christ's time much to condemn in the administration of justice in Judea. The glory of a state cannot be appreciated by those who study it only at its decline and fall.

CRIMES AND THEIR PUNISHMENT.

Having said thus much about the courts of Judea, we may pass by the civil jurisprudence of the country and inquire as to its criminal law. Only a few suggestions can be offered upon this subject, which has been so ably presented by the authors referred to.

At the English common law, crimes were punished under private prosecution. The individual wronged was the prosecutor. This was also the practice in Judea. Any member af the family of the deceased might pursue and kill the offender with impunity. The avenger of blood was the recognized minister of justice. This was an extra-judicial proceeding, and the right to it was lost as soon as the accused entered a city of refuge or was taken into the custody of the law for trial. It was not only the right but the duty of the party injured or a member of his famiiy, to prosecute the criminal before the courts, and this duty was so accurately defined and so rigidly enforced that the neglect of its performance was highly criminal. The people were subservient to the Mosaic precept, "Whoso sheddeth man's blood, by man shall his blood be shed."

All persons were amenable to the law. There was no privileged class that could claim exemption from punishment. Even the High Priest might be tried and condemned by the Great Sanhedrim. There were certain physical infirmities, however, which were a good defence to a criminal charge. Idiots and madmen were incapable of a criminal act, and the defence of lunacy or drunkenness was very much as it is now. But those forms of insanity which fall far short of madness, such as emotional insanity, moral insanity, irresistible impulse, and which have occasioned so much discussion among modern jurists, did not trouble the courts of Judea.

Nonage or infancy was divided into three periods. A child was spoken of as an infant from birth to six years, as an impubescent from seven to thirteen years, and from that age to twenty he was an adolescent. At twenty he was a man. The precise degree of criminal responsibility assumed during these periods is not known. Certain it is, however, that no one suffered capital punishment for any act committed while he was under the age of twelve or thirteen, and there is much to indicate that while a person under twenty might be punished for criminal conduct, yet he could not be put to death for any crime committed under that age, which was, it is said, the age of complete civil and criminal responsibility.

The lesser crimes or misdemeanors were numerous, but perhaps not so much so as with us. Many were only penal offences. We will not attempt to enumerate them, but will simply note the several forms of punishment enforced and the leading offences to which they are applied.

1. *Flagellation* was the highest corporal penalty inflicted. It was administered in this manner: The offender was tied down to a post in a reclining position. A public servant lashed the bare body with a whip of

four leathern straps. The number of lashes depended on the nature of the offence, but in no case were more than thirty-nine strokes allowed. There were many technical rules regarding this proceeding. It is said, "If, after being pinioned, the convict succeeds in escaping, or if the lash breaks at the second stroke, the sentence is considered executed and the prisoner is discharged. Flagellation was the punishment provided for the violation of the major part of those positive ordinances and negative precepts found in the Pentateuch. It is said that the Talmudists found here 613 such ordinances and precepts.

2. *Penal servitude* was the punishment for larceny. This involved the sale of the offender into the service of another. It was enjoined by a law of Moses, and it is said to be the only case where the Mosaic law imposes servitude on a Hebrew.

3. *Exile* was the penalty for involuntary manslaughter or accidental homicide. By exile we do not mean banishment in the modern acceptation of the term, but rather, confinement in a city of refuge. The Jews never banished their citizens. They deprecated emigration. It might tempt a Jew to irreligion, perhaps idolatry, the greatest of crimes.

A city of refuge is an institution not easily understood, by reason of the fact that it is without a parallel in our jurisprudence. There were six of them in Palestine. They had been established in obedience to the law of Moses, and were places of safety for any man who had accidentally and innocently taken the life of a fellow man. The avenger of blood could not slay the offender so long as he was within the walls of a city of refuge. Supposing a man were at work on a scaffold over a sidewalk and negligently let fall a stone, which struck one passing by and killed him. This would be involuntary manslaughter under our law, and so it was in Judea. But there, any member of the family of the deceased might pursue the wrong doer and slay him, that blood for blood might atone. To prevent injustice in such cases, the cities of refuge were established, and if the wrong doer could reach one of these cities, or if taken into custody of the law by the officers of the Sanhedrim, he was safe. Then he would be tried, and if found guilty of involuntary manslaughter, he would be conducted to one of the cities of refuge, there to remain until the death of the High Priest, when he would be discharged as guiltless.

Within the city of refuge, he had all the liberties of its inhabitants, and it is said his confinement there entailed no expense on the state, that the mother of the High Priest supplied the culprit and the officers with food and raiment, lest they might pray for the death of her son.

4. *Imprisonment* was not provided for by the Mosaic law, but in the reign of the kings it was adopted and under the Talmudists it was carefully regulated. It was the penalty for some irregular homicides, for accessories to murder, and for persons twice convicted of an offence punished by flagellation.

CAPITAL PUNISHMENT.

These observations regarding the minor offences and their punishment are sufficient. Let us give our attention to capital crimes. When Blackstone wrote his Commentaries, there were 160 offences punished with death in England. But in Christ's time in Judea, only 36 offences were so punished, and these were in kind only twelve in number, namely idolatry, murder, rape, adultery, incest, sodomy or bestiality, kidnapping, maladministration, witchcraft, blasphemy, Sabbath-breaking and the violation of filial duty. Only those crimes which tended to undermine the social fabric were punished with death.

We are familiar with only one or two forms of capital punishment. We should remember, however, that in Greece there were ten methods and at Rome many more. In Judea there were only four kinds of capital punishment, and of these in their order.

1. *Stoning* to death was the penalty for 18 offences, which included chiefly various forms of adultery, rape, bestiality and Sabbath-breaking. The popular impression that one condemned to die by stoning was pelted with stones by the multitude is erroneous. The execution of the sentence was regular and somewhat formal. It involved precipitation, then a common form of capital punishment. The condemned was taken to a cliff or some elevation erected for the purpose, and cast over by the witnesses for the prosecution, for, as a rule, the witnesses were the executioners. If the fall did not occasion death, then a witness took a large stone and threw it upon the victim, and he was not then executed, the bystanders pelted him with stones until he was dead. Sometimes the victim escaped.

2. *Burning* was the penalty for incest and criminal commerce with the priest's daughter. The sentence of death by burning was executed in the following manner: The condemned was securely fastened so that he could not move, then his mouth was forced open and molten lead was poured down his throat. Burning at the stake was not practiced in Judea. They burned from the inside out.

3. Decapitation was the penalty for two offences, namely: murder and criminal apostasy from Judaism to idolatry. The sentence was executed by fastening the culprit to a post and severing his head from the body by a stroke of the sword.

4. Strangulation was the form of death penalty in all cases where the bible calls for the punishment of death but does not point out the method of execution. It was the penalty for idolatry, kidnapping, false prophecy, and a few other crimes of less importance. The sentence was executed by placing the culprit in soft earth up to his knees, then he was securely fastened, a cord wrapped with a soft cloth was wound round his neck, and at either end of the cord stood the executioners, who pulled until life was extinct. This was regarded as the mildest form of capital punishment, and, as you see, in no way resembles death by hanging.

5. *Hanging* was not a form of death penalty in Judea, but was a posthumous ignominy, inflicted after the death penalty by stoning had been executed in cases of idolatry and blasphemy. Over the corpse of the victim was erected our modern gallows with its upright post and extending arm. From this arm the corpse was suspended, to remind the people of the great indignity which might be brought on the family of any idolator or blasphemer. It hung, however, for an instant only, enough that the letter of the law had been fulfilled. It is said that two executioners performed this post mortem ceremony, that one hung the corpse and the other took it down, and that while one was tieing the last knot in the rope the other commenced to untie the first knot tied. It is to the credit of the Jews that they made haste to put this unseemly performance out of sight.

It is interesting to observe that among all the forms of capital punishment recognized by the Jews, crucifixion was not one of them. And yet Jesus Christ, a Jew, tried and condemned for violation of Jewish law, was punished, at the command of the Jews, by a form of punishment unknown to the laws of his country.

disloyal States were illegal and void.[1] Such contracts remain void after peace is restored.[2] The note of a conscript in the Confederate army to his substitute for serving in his stead is void.[3] Contracts between the inhabitants of the rebel States, not in aid of the rebellion, were valid.[4] One citizen of the United States has no right to purchase of, or sell to another, a license or pass from the public enemy, to be used on board an American vessel.[5] Contracts to make assignments to third persons of gratuities that may be received from the government for services are void.[6] A contract for the appropriation of public money for purposes not sanctioned by law is void.[7] No action can be maintained for contribution by a partner for a loss sustained by an unsuccessful attempt to impose spurious vouchers on the government.[8] A contract by which the duties of a public officer are to be performed by another is void.[9] A promise to pay one out of the public funds for doing what the law requires a public officer to do is void.[10] But contracts to pay individuals for assisting public officers in the prosecution of public business are valid.[11] A contract to pay a public officer for doing more than his duty is valid.[12] An agreement of a public officer to do that which is illegal is void.[13] A contract destructive of competition for public office is void.[14] Any contract to appoint one to a public office,[15] or involving the sale of a public office,[16] or in consideration of an exchange of offices,[17] or to secure an office for one,[18] or in consideration of resignation from office, is void.[19] Contracts for the assignment of the salaries of public officers,[20] except when earned, are void.[21] Personal solicitation to influence legislation cannot constitute the subject matter of a legal contract. Agreements for services as a lobby agent before the legislature are void, as being prejudicial to sound legislation.[22] But there is a distinction between the services of a lobbyist, who works by secret personal influence, and those of an agent who appears before the legislature, or a committee thereof, as a body, to exert an honest influence by the open statement of facts and arguments. Persons may, no doubt, be employed to conduct an application to the legislature, as well as to conduct a suit at law; and may contract for and receive pay for their services in preparing or making arguments, provided they are used before the legislature itself, or some committee thereof, as a

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[1]Mitchell v. United States, 21 Wall. 350; United States v. Lapene, 17 Wall. 601; Densmare v. United States, 93 U. S. 605; Walker's Ex. v. United States, 106 U. S. 413. [2]Hanger v. Abbott, 6 Wall. 532. [3]Heidenreich v. Leonard, 21 La. An. 628. [4]Mitchell v. United States, 21 Wall. 350. [5]Patton v. Nicholson, 3 Wheat. 204. [6]Decker v. Saltsman, 1 Hun (N. Y.) 421, 426. [7]Capehart v. Rankin, 3 W. Va. 571. [8]Bartle v. Nutt, 4 Pet. 184. [9]Engle v. Chipman, 51 Mich. 524. [10]Clough v. Hart, 8 Ks. 487. [11]Price v. Caperton, 1 Duv. (Ky.) 207. [12]Converse v. United States, 21 How. 463. [13]Jackson v. Bowman, 39 Miss. 671. [14]Hunter v. Nolf, 71 Pa. St. 282. [15]Hager v. Catlin, 18 Hun (N. Y.) 418; Cf. Stout v. Ennis, 28 Ks. 706. [16]Hall v. Gavitt, 18 Ind. 390. [17]Stroud v. Smith, 4 Houst. (Del.) 448. [18]Meguire v. Corwine, 101 U. S. 108. [19]Eddy v. Capron, 4 R. I. 394. [20]Field v. Chipley, 79 Ky. 260. [21]Birkbeck v. Stafford, 23 How. Pr. (N. Y.) 236. [22]Harris v. Roof's Executors, 10 Barb. (N. Y.) 489; Powers v. Skinner, 34 Vt. 274, 281; Rose v. Truax, 21 Barb. 361.

body; but they cannot with propriety be employed to exert their personal influence with individual members. The latter class of cases tends to pervert, the former to enlighten the legislative mind. Public policy, therefore, forbids the latter but allows the former.[1] An agreement to do anything in consideration of forbearance of efforts to procure the repeal of a law,[2] or to grant to individuals certain privileges in consideration of the withdrawal of opposition to the passage of a legislative act, is void.[3] Any contract which would restrict the free action of any person in respect to the preliminaries of an election is void.[4] An agreement to pay one for legitimate political work is valid.[5]

Any agreement which in itself,[6] or which contemplates,[7] or involves,[8] or requires,[9] or is calculated to induce,[10] a dereliction or laxity in the performance of public or private[11] duty is void. A contract to do[12] an act, or which contemplates[13] the doing of an act, or in consideration[14] of the doing of an act, when such act is a violation of law, is void. Where the act is not illegal, and the manner of performance may be lawful, and the parties to the contract contemplate a lawful performance, though one does the act in an illegal manner, the contract is enforcible when the manner of performance is not of the essence of the contract.[15] A contract respecting the securities of an unlawful government is void.[16] The courts of the United States will not enforce an agreement entered into in fraud of a law of the United States, although the agreement was made between persons who were then enemies of the United States, and its object was a mere stratagem of war.[17] A contract by one occupying government lands with the intention of pre-empting the same, by which a third person is given an interest therein, is void,[18] unless the same is given in consideration of means or labor furnished to enable the promisee to receive the benefits of the law, and the law does not upon its face show hostility to such an agreement.[19] A contract not to enter government lands under the rights secured by the pre-emption law is void.[20] Agreements for the withdrawal of opposition to a claim under the pre-emption law is void.[21] A covenant not to convey or lease land to a Chinaman is void.[22] When a person has entered as much coal land as the statutes of the United States permit, a contract whereby another person is to enter additional coal land, obtain the title, and then convey to the first, is contrary to public policy.[23] A contract which secures a pref-

[1]Sedgwick v. Stanton, 14 N. Y., 289, 293; Marshall v. B. & O. R. R. Co., 16 How. 314. [2]Reed v. Peper T. W. Co., 2 Mo. App. 82. [3]Pingry v. Washburn, 1 Aiken (Ver.) 264. [4]Nichols v. Mudgett, 32 Vt. 546; Liness & Hesing, 44 Ill., 113. [5]Sizer v. Daniels, 66 Barb. 426. [6]Poultney v. Randall, 9 Bosw. (N. Y.) 232. [7]Dake v. Patterson, 5 Hun (N. Y.) 558. [8]Kingsbury v. Ellis, 4 Cush. (Mass.) 578. [9]Elkhart Co. Lodge v. Crary, 98 Ind. 238. [10]Noel v. Drake, 28 Ks. 265. [11]Merritt v. Lambert, 10 Paige (N. Y.) 352. [12]Pratt v. Draughon, 21 La. An. 194. [13]Swanger v. Mayberry, 59 Cal. 91. [14]Nix v. Bell, 66 Ga. 664; Johnson v. Leonhard, 1 Wash. St. 564. [15]Favor v. Philbrick, 7 N. H. 326. [16]Branch v. Haas, 16 Fed. Rep. 53. [17]Hannay v. Eve, 3 Cranch 242. [18]Evans v. Folsom, 5 Minn. 342. [19]Horm v. Shamblin, 57 Tex. 243. [20]Carr v. Allison, 5 Blackf. (Ind.) 63. [21]Snow v. Kimmer, 52 Cal. 624. [22]Gandolfo v. Hartman, 49 Fed. Rep. 181. [23]Johnson v. Leonhard, 1 Wash. St. 564.

erence for the benefit of a particular creditor is void.[1] Agreements made in consideration of discharges in bankruptcy are void.[2] A promise to pay a debt notwithstanding the discharge thereof by certificate in bankruptcy is valid.[3] An agreement to make a particular testamentary disposition is valid.[4] The purchase price cannot be recovered on goods sold in violation of law.[5] Insurance upon property illegally kept,[6] carried,[7] or used,[8] is void. Contracts made on Sunday when the *lex loci contractus* declares the same illegal, are void.[9] A contract made on Saturday to take effect on Sunday is valid.[10] The mere signing of a contract on Sunday, which is not delivered on that day, does not avoid the contract under a statute forbidding the doing of any business on that day.[11] A contract by which a stranger is to bear the expense of litigation,[12] especially when he has an interest in its result,[13] is void. And the assignment of a judgment made in pursuance of such an agreement is void.[14] But the purchase of claims for the purpose of beginning litigation is valid.[15] Rights of action for breach of contract, personal in nature, as a promise of marriage,[16] or for tort,[17] are not assignable even after verdict, except where the right of suit is created for the benefit of representatives.[18] The assignment of a right in litigation, to an attorney, either by way of purchase,[19] or payment in advance for services in the prosecution of such right,[20] is void, although such assignment would be valid if made to others: But the assignment of a defendent's interest in property attached in a suit, is valid, although made in consideration of future, as well as past services, in a suit, and in one growing out of such attachment.[21] The assignment to an attorney of a right of action as payment for services rendered is valid.[22] So also is the assignment of a judgment.[23] An agreement calculated to induce a commission of perjury,[24] or the procurement of false testimony,[25] or contemplating a fraud upon the rules of evidence,[26] or the suppression of lawful testimony,[27] or which regulates the disclosure which a witness shall make,[28] or which contemplates the assertion of unjust claims, is void.[29] A contract to pay money for the detection of crime is valid.[30] An agreement to procure bail for a prisoner is valid.[31] An agreement to assist one from fleeing from justice, when

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[1]Claflin v. Torlina, 56 Mo. 369. [2]Blasdel v. Fowle, 120 Mass. 447. [3]Shippey v. Henderson, 14 Johns (N. Y.) 178. [4]Logan v. McGinnis, 12 Pa. St. 27. [5]Milner v. Patton, 49 Ala. 423; Smith v. Arnold, 106 Mass. 269; Skiff v. Johnson, 57 N. H. 475. [6]Kelly v. Home Ins. Co., 97 Mass. 288. [7]Parkin v. Dick, 11 East 502. [8]The Hiram, 1 Wheat. 440. [9]Sayre v. Wheeler, 31 Ia. 112. [10]Stacy v. Kemp, 97 Mass. 166. [11]Gibbs & Sterrett Mfg. Co. v. Brucker, 111 U. S. 597. [12]Low v. Hutchinson, 37 Me. 196. [13]Boardman v. Thompson, 25 Ia. 487. [14]A. T. & S. F. R. R. Co. v. Johnson, 29 Ks. 218. [15]Schaferman v. O'Brien, 28 Md. 565 [16]*Ex-parte* Charles, 14 East 197. [17]Rice v. Stone, 1 Allen (Mass.) 566. [18]Quin v. Moore, 15 N. Y. 432. [19]Arden v. Patterson, 5 Johns Ch. (N. Y.) 44. [20]Miller x. Newell. 20 So. Car. 123. [21]Ware's Adm. v. Russell, 70 Ala. 174. [22]Mackey v. Mackey, 43 Barb. (N. Y.) 58. [23]Burtis v. Cook, 16 Ia. 194. [24]Dawkins v. Gill, 10 Ala. 206. [25]Patterson v. Donner, 48 Cal. 369. [26]Crosier v. Acer, 7 Paige (N. Y.) 137, 141. [27]Hoyt v. Macon, 2 Colo. 502. [28]Wright v. Rindskopf, 43 Wis. 344. [29]Rhodes v. Sparks, 6 Pa. St. 473. [30]Furman v. Parke, 21 N. J. L. 310. [31]Lehndorf v. Shields, 13 Mo. App. 486.

charged with crime is void.[1] Agreements to forego,[2] or to discontinue,[3] prosecution of crime, are void. A contract by which the control of the interested party over litigation is limited is void.[4] A contract suspending the right, for a limited time, of one party, to appeal to the courts, is valid.[5] Contracts for the creation of corners in the market,[6] or to control the traffic in any staple which is a necessary,[7] or to enhance the value thereof,[8] or to withhold the same from the market,[9] are void. But contracts to raise the price of an article to a reasonable point,[10] or to fix a minimum price therefor, when no intention to create a monopoly exists,[11] are valid. In general, the formation of trade unions for mutual benefit is valid.[12] Combinations among employers for the protection of their common interests are valid.[13] Contracts promotive of monopoly are void.[14] Contracts by those engaged in private business, owing no duty to the public, securing a monopoly to one are not invalid.[15] A municipal corporation cannot grant a monopoly unless its charter expressly authorizes it so to do.[16] A State legislature may grant to a corporation or an individual a monopoly or exclusive privilege unless the State constitution forbids.[17] But a State legislature cannot grant a monopoly on a subject which the federal government controls.[18] Persons engaged in business of a public nature are not permitted to make discriminating contracts.[19] A contract for the exclusive right to supply a certain district with flour prepared under a certain patent, for a royalty, is not invalid.[20] A railroad may give a 'bus and baggage company the exclusive privilege of soliciting business on its premises.[21] Contracts, the object or necessary operation of which tends to diminish competition for anything, the sale of which is controlled by the public, are void.[22] Contracts which in their nature or object are calculated to diminish competition for the obtainment of a public[23] or quasi-public[24] contract, to the detriment of the public, or those awarding the contract, are void. Agreements which have for their object the dimunition of competition at

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[1]Dodson v. Swan, 2 W. Va. 511. [2]Roll v. Raguet, 4 O. 400. [3]Henderson v. Palmer, 71 Ill. 579. [4]Boardman v. Thompson, 25 Ia. 487. [5]Mahler v. Phœnix Ins. Co., 9 Heisk. (Tenn.) 399. [6]Raymond v. Leavitt, 46 Mich. 447; Cummings v. Foss, 40 Ill., App. 523. [7]Craft v. McConoughy, 79 Ill., 346. [8]Morris Run Coal Co., v. Barclay Coal Co., 68 Pa. St. 173. [9]Arnot v. Pittston and Elmira Coal Co., 68 N. Y. 558. [10]Skrainka v. Sharringhausen, 8 Mo. App.522. [11]Marsh v. Russell, 66 N. Y. 288. [12]Snow v. Wheeler, 113 Mass. 179; Common-wealth v. Hunt, 4 Met. (Mass.) 111. [13]Koehler v. Feuerbacher, 2 Mo. App. 11. [14]Richardson v. Buhl, 77 Mich. 632; Emery v. Candle Co., 47 O. St. 320; Jackson v. Bowman, 39 Miss. 671; Rogers L. & M. Wks. v. Erie R. Co., 20 N. J. Eq. 379; W. U. T. Co., v. Am. Un. Tel. Co., 65 Ga. 160; W. Va. Trans. Co. v. Ohio River Pipe Line Co., 22 W. Va. 600; Chicago Gas Light & Coke Co. v People's Gas Light & Coke Co., 121 Ill. 530; People *ex rel.* Peabody v. Chicago Gas Trust Co., 130 Ill. 268. [15]Sharp v. Whiteside, 19 Fed. Rep. 156. [16]State v. Cincinnati etc. Co., 18 O. St. 262. [17]Boston etc. R R. Corp. v. Salem etc.R. R. Co., 2 Gray (Mass.) 1. [18]Gibbons v. Ogden, 9 Wheat. 1. [19]Denver & N. O. R. Co. v. A. T. & S. F. R. R. Co., 15 Fed. Rep. 650; Stewart v. Lehigh V. R. R. Co., 38 N. J. L. 505, 520; State *ex rel.* v. Tel. Co., 36 O. St. 296; W. U. T. Co. v. B. & O. Tel. Co., 23 Fed. Rep. 12. [20]Heckers v. Fowler, 2 Wall. 123. [21]Old Colony R. R. v. Tripp, 147 Mass. 35. [22]Gibbs v. Smith. 115 Mass. 592. [23]Kennedy v. Murdick, 5 Harr. (Del.) 458. [24]Ray v. Mackin, 100 Ill. 246.

a public sale of property are void.[1] A contract by the owners of a railway, with the owners of a rival railway, not to extend the road beyond a certain point, is void.[2] A contract which contemplates the commission of crime,[3] or which, if consummated, will involve the parties in crime,[4] is void. It is contrary to public policy to give the aid of the courts to the vendor, who knew that his goods were purchased, or to the lender, who knew that his money was borrowed, for the purpose of being employed in the commission of a criminal act injurious to society or to any of its members.[5]

A contract by which one surrenders his personal liberty is void,[6] except when it is to continue in operation only until payment of a debt contracted upon credit, based upon the security which the custody of the debtor affords.[7] Contracts which restrain the business or industrial freedom of a person within reasonable limits are valid,[8] whether the restraint operate for all time or only for a limited period.[9] Covenants restraining free alienation of property, when breach does not produce forfeiture, are void,[10] except the covenants be made with the United States with reference to lands granted by it,[11] or the operation of such covenants is confined to such reasonable period as is required by the covenantee for the determination of the judiciousness of the exercise of his right of pre-emption of the property.[12] Covenants restricting the use of property are valid.[13] A contract by a husband that a wife shall convey her property, is void, even as to his own interest.[14] So also is one by her husband to convey his own land free of dower, except as to his own interest.[15] But a conveyance of the husband's fee simple interest, with security against the wife's dower, is valid.[16] An agreement by an employee that, in the event of his leaving the employ of the promisee without giving the agreed notice, he shall forfeit all wages earned, is valid.[17] An agreement to abstain from resorting to the courts, is void.[18] A contract waving a substantial right to be asserted by a litigant is void.[19] A contract restraining the assignment of an agreement otherwise assignable, is valid, where the restraining covenant is not a mere incident to the

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[1]Hale v. Henderson, 4 Humph. (Tenn,) 199; People v. Stephens, 71 N. Y. 527. [2]Ver. &Mass. R. R. Co. v. Fitchburg R. R. Co., 14 Allen (Mass.) 462. [3]Hocker v. Gentry, 3 Met. (Ky.) 463, 469. [4]Drennan v. Douglas, 102 Ill. 341. [5]Hananer v. Doane, 12 Wall. 342 [6]*In re* Baker 29 How. Pr. (N. Y.) 48 5. [7]Commonwealth v. Schultz, Brightley (Pa.) 29. [8]Morgan v. Perhamus, 36 O. St. 517; Cook v Johnson, 47 Conn. 175; Goodman v. Henderson, 58 Ga. 567; Lange v. Werk, 2 O. St. 520. [9]Cook v. Johnson, 47 Conn. 175; Oregon S. N. Co., v. Winsor, 20 Wall. 64, 67. [10]Sears v. Putnam, 102 Mass. 5; Campau v. Chene, 1 Mich. 400; Mandelbaum v. McDonnell, 29 Mich. 78; Oxley v. Lane, 35 N. Y. 340; McCleary v. Ellis, 54 Ia. 311; Hood v. Oglander, 34 Beavens 513; Barnard v. Bailey, 2 Harr. (Del.) 56; Attwater v. Attwater, 18 Beavens 330; Grant v. Carpenter, 8 R. I. 36; Overbagh v. Patrie, 8 Barb. (N. Y.) 28. [11]Farrington v. Wilson, 29 Wis. 383. [12]Jackson v. Schultz, 18 Johns (N. Y.) 174. [13]Langley v. Chapin, 134 Mass. 82; Cowell v. Springs Co., 100 U. S. 55; Watertown v. Cowen, 4 Paige (N. Y.) 510, 514; Gillis v. Bailey, 21 N. H. 149; Tobey v. Moore, 130 Mass. 448. [14]Clarke v. Reins, 12 Gratt. (Va.) 98. [15]Young v. Paul, 2 Stock. (10 N. J. Eq.) 401, 408. [16]Id. [17]Potter v. Cain, 117 Mass. 238. [18]Doyle v. Continental Ins. Co., 94 U. S. 535. [19]Clark v. Spencer, 14 Ks. 398.

objects of the principal covenants,[1] unless the maker of the agreement has parted with his interest.[2] A stipulation in a contract, by which a party thereto is to be exempt from suit for damages caused by him through its breach, unless a claim therefor is presented within a definite period, is valid, unless such period is unreasonably short.[3] A contract which relieves the common carrier of responsibility for the carriage of goods or passengers, on account of loss or injury, except when the same occurs through the misconduct or negligence of himself, or those in his service, is void.[4] So also is a contract limiting the carrier's liability for damages for loss of property carried by him,[5] even though the loss be occasioned through the misconduct or negligence of the carrier, or those in his service.[6] A contract containing the provision that the railroad company will not be liable for damages to a person riding on a free pass is valid.[7] An express company is liable for goods lost through its negligence, though its receipt for the goods provides otherwise. Proof of loss raises presumption of negligence.[8] A contract which limits the liability of a telegraph company for errors in the transmission of an unrepeated message is valid,[9] when an opportunity of repitition is afforded, and the errors are not caused by negligence on the part of the company or its servants.[10] But a contract by which a telegraph company exempts itself from liability for delay in the delivery or non-delivery of a message, unless it is repeated, is void.[11] A contract providing that a common carrier shall be exempted from liability for damages caused by the negligence of connecting lines, not under its control, is valid.[12] A contract to pay for services in enabling the promisor in doing something unlawful is void.[13] But where the employee is ignorant of the fact essential to make the occupation illegal, he may recover.[14] Any promise which secures to one of several, who are acting with others in a matter of common interest, or who are signing a common agreement with the same object, any secret advantage over his associates, which moves the former, but is purposely withheld from the latter, is void.[15] Any contract contemplating the practice of deception upon the public, or its officers, or upon a party in interest, as to the ownership of property,[16] or financial condition,[17] or the responsibility assumed by an obligation,[18] or upon third persons,[19] is void. A contract

[1]Grigg v. Landis, 4 C. E. Green (N. J.) 350; see also Id., 6 Id. 494. [2]Goit v. Ins. Co., 25 Barb. (N. Y.) 189. [3]Young v. W. U. T. Co., 65 N. Y. 163; Heiman v. W. U. T. Co., 57 Wis. 562; W. U. T. Co. v. Reynolds, 77 Va. 173, 184; W. U. T. Co. v. Fairbanks, 15 Bradw. (Ill. App.) 600; Wabash, etc., Co. v. Black, 11 Bradw. 465. [4]Camp v. Hartford, etc., S. B. Co., 43 Conn. 333; Railroad Co. v. Lockwood, 17 Wall. 357. [5]Lawrence v. N. Y., Prov. & Boston R. R. Co., 36 Conn. 63. [6]Oppenheimer v. U. S. Ex. Co., 69 Ill. 62. [7]Ulrich v. N. Y. etc., R. R., 108 N. Y. 80. [8]Adams Ex. Co. v. Harris, 120 Ind. 73. [9]Ellis v. Am. Tel. Co., 13 Allen (Mass.) 226; Jones v. W. U. T. Co., 18 Fed. Rep. 717. [10]Candee v. W. T. U. Co., 34 Wis. 471; Bartlett v. W. U. T. Co., 62 Me. 209, 219. [11]Manville v. W. U. T. Co., 37 Ia. 214; W. U. T. Co. v. Fenton, 52 Ind. 1. [12]W. U. T. Co. v. Carew, 15 Mich. 525. [13]McGreal v. Wilson, 9 Tex. 426; Davis v. Caldwell, 2 Reb. (La.) 271. [14]Wright v. Crabbs, 78 Ind. 487. [15]Bastian v. Dreyer, 7 Mo. App. 332. [16]Cambieceo's Exrs. v. Maffett's Assignees, 2 Wash. C. C. 98; Maybin v. Coulon, 4 Dall. 298. [17]Tucker Smith, 4 Me. 415; Bolt v. Rogers, 3 Paige (N. Y.) 154. [18]Poultney v. Randall, 9 Bosw. v. (N. Y.) 232. [19]Randall v. Howard, 2 Black (U. S.) 585.

that property shall pass to one party to the contract upon the happening of an uncertain event is void.[1] A contract to deliver or buy a commodity at a future time is valid, even if the vendor has not the commodity at the time of the contract, nor has entered into a contract to buy the same, nor has any expectation of becoming possessed of the same at the time appointed for delivery, except by obtaining it in the open market,[2] if the *bona fide* intention of the parties, or of the one suing for the breach of the contract, if not of the one sued, be that the same shall be delivered at the appointed time.[3] But a contract made as a cover for a mere wager upon the price of such commodity, with no intention on the part of the seller to deliver, or of the buyer to accept same, but the purpose of both is to pay the difference between the contract price and the market value at the time agreed, accordingly as the price has risen or fallen, is void.[4] A contract to deliver, or pay the differences, if the delivery is waived, is not void, when there is no understanding at the time that no delivery shall be made.[5] An agreement by a corporation that it will pay interest or dividends on its capital stock, without reference to its ability to pay them, from the earnings of the company, is void.[6] A promise made in consideration of the promisee's consent to marry one,[7] or of his efforts in procuring a marriage for another,[8] is void. A contract in restraint of the freedom of marriage is void.[9] A waiver by a woman, in contemplation of marriage, of claims upon the property of her intended husband is void,[10] unless a substitute is provided.[11] But a waiver by a man in contemplation of marriage, of marital claims upon the personality of his intended wife is valid.[12] Agreements between husband and wife subsequent to marriage regarding their property are valid.[13] A contract contemplating an immediate separation,[14] or which provides for her future support,[15] is valid. But an agreement contemplating future separation is void.[16] An agreement conditioned on the obtainment of divorce,[17] or intended to facilitate its procurement,[18] or to prevent the annulment of a decree of divorce,[19] is void. An agreement contemplating the discontinuance of divorce proceedings is valid.[20] A contract by which a parent releases to his child the rights which the law gives the parent is valid.[21] So also is a contract by which a father transfers to a third person his right to his child's services.[22] A contract for the support of a child, although made in connection with the surrender of his

[1]Russell v. Pyland, 2 Humph. (Tenn.) 131; Craig v. Andrews, 7 Ia. 17, 23; Joseph v. Miller, 1 N. Mex. 621. [2]Appleman v. Fisher, 34 Md. 540. [3]Fryst v. Clarkson, 7 Cow. (N. Y.) 24. [4]Brua's Appeal, 55 Pa. St. 294. [5]Kent v. Miltenberger, 13 Mo. App. 503. [6]Pittsburg etc. R. R. Co. v. Allegheny Co., 63 Pa. St. 126; Lockhart v. Van Alstyne, 31 Mich. 76. [7]Keat v. Allen, 2 Vern. 588. [8]Johnson's Adm. v. Hunt, 81 Ky. 321. [9]Chalfant v. Payton, 91 Ind. 202. [10]Curry v. Curry, 10 Hun. (N. Y.) 366. [11]Pierce v. Pierce, 71 N. Y. 154. [12]Charles v. Charles, 8 Gratt. (Va.) 486. [13]Butler v. Rickets, 11 Ia. 107. [14]Carson v. Murray, 3 Paige (N. Y.) 483. [15]Bettle v. Wilson, 14 O257. [16]Durant v. Tilley, 7 Price 577. [17]Speck v. Dausman, 7 Mo. App. 165. [18]Sayles v. Sayles, 21 N. H. 312. [19]Comstock v. Adams, 23 Ks. 513. [20]Adams v. Adams, 91 N. Y. 381. [21]Jenness v. Emerson, 15 N. H. 486. [22]Stewart v. Ricketts, 2 Humph. (Tenn 151.

custody, is valid.[1] A promise made in consideration of illicit intercourse,[2] or calculated to encourage immorality,[3] is void. When the law tolerates prostitution within given limits, contracts to promote it, are valid.[4] A contract made to indemnify one from liability on an illegal contract is void.[5] A contract to save one harmless from the consequences of an unlawful act,[6] or breach of duty,[7] is void.

Questions of public policy are for the Court and not for a jury.[8] When it clearly appears in a proceeding that a claim set up is against public policy, and that in no event could it be sustained, the tribunal should dismiss it, whether the allegations of the parties have or have not raised the question.[9] But the design to prejudice the public interest must clearly appear to warrant a court in pronouncing a contract void.[10] The validity of a contract is determined by the tendency of the class of contracts to which it belongs, and not by its effect in a particular case.[11] When a contract is valid, in the absence or existence of certain facts, but otherwise void, it is, in the absence of evidence, presumed to be valid,[12] and the burden of proving the absence or existence of such facts, rests upon him who asserts its invalidity.[13] But when a contract appears on its face to be void, and the law allows the promisee to show by parol that the fact necessary to make it illegal, does not exist, the burden of establishing the non-existence of such fact, rests on him who asserts its validity.[14] The fact that one party to an agreement which is void because against public policy, has performed his part, does not give him the right to sue for damages for failure of the other party to perform his part.[15] No one can estop himself from proving facts which will show a contract to be opposed to public policy.[16]

The West Side Park Commissioners of the City of Chicago lately refused the petition of some patriotic Bohemians to erect a monument to John Huss in a public city park, on the ground that "the erection of such a monument would be contrary to public policy." There was no statute, no decision, no proclamation upon which they could have based this ruling; therefore, it must have been the expression of a mere sentiment. Public policy is not a mere sentiment; it is a principle, that looks to the welfare of the many, and subordinates the interests of the few, in cases where these interests conflict. This principle has this controlling power because it is the creature of the legislative will, and is a part of the law of the land.

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[1]Allen v. Affleck, 64 How. Pr. (N. Y.) 380. [2]Goodal v. Thurman, 1 Head (Tenn.) 209, 219; Forsythe v. State, 6 O. 20; Greenwood v. Curtis, 6 Mass. 358, 379. [3]Dougherty v. Seymour, 16 Colo. 289; Anheuser-Bush Brew. Assn. v. Mason, 44 Minn. 318. [4]Lyman v. Townsend, 24 La. Ann. 625. [5]Hayded v. Davis, 3 McLean (U. S.) 276. [6]Collier's Adm. v. Windham, 27 Ala. 291. [7]Buffendeau v. Brooks, 28 Cal. 642. [8]Pierce v. Randolph, 12 Tex. 290. [9]Lee v. Johnson, 116 U. S. 48. [10]Richmond v. Dubuque & Sioux City R. R. Co., 26 Ia. 191, 202; Kellogg v. Larkin, 3 Pinney (Wis.) 123. [11]Richardson v. Crandall, 48 N. Y. 348, 362. [12]Martin v. Bartow Iron Works, 35 Ga. 320. [13]Nason v. Dinsmore, 34 Me. 391. [14]Bustin v. Rogers, 11 Cush. (Mass.) 346. [15]Kountze v. Flannagan, 64 Hun (N. Y.) 635. (Syllabus from Am. Dig. 1892.) [16]Spare v. Home Mut. Ins. Co., 15 Fed. Rep. 707.

NOTES.

THE NEW MANAGEMENT.

With the November number of the MICHIGAN LAW JOURNAL, the editors announce a change in the entire editorial board, and the removal of the business headquarters from Grand Rapids to Detroit. Mr. Harry D. Jewell, who has been connected with the magazine from its inception, will continue to act, but in the capacity of local business manager for Grand Rapids. Mr. Sutton and Mr. Stone, the other members of the trio of founders, who have so judiciously guided the Magazine's course during the past three years, while retiring from active participation in its management, will still in various ways extend substantial aid to the present editors.

The scope of the magazine will be gradually enlarged, introducing innovations, which it is hoped, will meet with universal approval among its readers. Reports of decisions rendered both in the Supreme Court and the various Circuit Courts of this State, together with a digest of all cases in the United States Courts, which may affect or peculiarly appertain to Michigan interests, will materially enhance the magazine as one of reference. A carefully compiled attorney's list will afford convenience in the interchange of Commercial Law business, in accordance with the comity so generally observed among members of the legal profession. The general style and conduct of the magazine will remain unaltered. The number of leading articles will be augmented, and to this end we respectfully solicit from our many able contributors a continuation of the favors so generously bestowed in the past. The JOURNAL fills a unique position with reference to the bar of Michigan, and the determined aim of its editors will be to attain and maintain that lofty standard of excellence eminently befitting its calling.

THE COURTS OF JUDEA.

This article by Prof. Jerome C. Knowlton is of unusual interest. It treats of a subject which is a sealed book to all except antiquarians. And yet the Jews had one of the most perfectly developed of ancient judicial systems.

Prof. Knowlton has made this subject his special study, and gives us in one article a very complete idea of the formation an character of the courts of Judea, and their manner of executing its decrees.

PUBLIC POLICY.

In this issue we publish an article on Public Policy written by one of last year's graduates of the University of Michigan. It is a graduating thesis, but it is safe to say that it is much better than the average production of the law school graduate.

It carries with it the evidence of careful preparation and treats the subject very fully considering its length. It will prove valuable to both practitioners and students. To the former, because though a thesis in form and connectiveness it is a digest in completeness. To the student it will afford a means of getting a good insight into this important branch of the law with comparatively little effort.

SOME RECENT MICHIGAN LAND DECISIONS.

A number of Michigan land cases which will govern a great many others were decided last month by Secretary Hoke Smith. Among them is the case of Dillon and Edwards against Heffernan. In 1888 Heffernan made a homestead application for a quarter section in the Marquette district. The application was rejected on the ground that the land had already been certified to the State of Michigan. These lands were restored to entry by the act of March 2, 1889, and Heffernan on the following May renewed his application. Dillon and Edwards contested his claim alleging settlement on the land on March 7, 1887. The land was awarded to the latter by the local land office which held that Heffernan had waived his original application by his subsequent one. This decision was reversed by the general land office, and Secretary Smith upheld the reversal.

Secretary Smith by sustaining the decision of the general land office in the applications of Matthew Elliott and Claude Corlett, has settled another case of special interest in Michigan. Elliott and Corlett made application for homestead entries in Bois Blanc Island, Grayling land district, which the land office rejected on the ground that the lands formed part of a military reservation.

INQUISITORIAL METHODS OF BRIBERY INVESTIGATION.

Inquisitorial methods brought to bear and prosecuted to a worthy end, are productive of positive and permanent benefit to the body politic. Especially do they constitute a potent factor in their application to that most corrupt of public vices—bribery. When the torch of inquisition is permitted to illumine the deep shadows which here and there obscure from public gaze the path of the public official, the inquisitor's keen scrutiny discerns in many instances the most infamous forms of corruption. The investigations now pending before the Lexow Committee in New York City, are attracting universal attention. Moreover they are eliciting the approval of all true and right-minded citizens. To all intents and purposes, the entire police system in that city has been placed under the ban, from the commissioners to the plain, nominal guardians of the peace. Instead of according protection to the people, by the persistent pursuit of crime and determined efforts to abolish it, they have shielded and nourished it for purposes of revenue. There are well founded reasons for suspecting, that were the Health Board, Dock Department and Excise Board, as well as other commissions, subjected to the same careful investigation, an equally deplorable state of affairs would be revealed. In all of our great centers of population a similar condition exists in some degree. The recent trials in Detroit of certain school inspectors upon this grave charge, evince a commendable spirit of reform. Fearless investig\tion and

prosecution will prove effectual as a deterrent of an evil which has developed so alarmingly. Our statute relative to the corrupt acceptance of any gift or gratuity on the part of any executive, legislative or judicial officer, or any promise to make any gift or to do any act beneficial to such officer, under an agreement that his vote, opinion, judgment, nominations or appointments, shall favor any particular person or class of persons, is sufficiently severe and inflexible. In the case of People *vs.* Swift, 59 Mich. 529, it was positively established that Sections 9241 and 9242 Howell's Statutes, punishing bribery in the case of "any executive, legislative or judicial officer," apply as well to municipal, as to State officers, the character of whose duties falls within any of those definitions; and a construction which would take cities and other public corporations out of the protection of these laws, would be dangerous and unnatural. The clause which prohibits officers of public institutions from being interested in contracts made therewith, is equally unequivocal. Obviously there has been no lamentable dearth of proper legislation upon the subject. However existing conditions demand a spirit of aggressiveness, bordering upon censorship, in the investigation of transactions bearing semblance to dishonesty or breach of public trust.

LATEST DEVELOPMENTS OF THE DETROIT STREET RAILWAY CASE.

The long and eagerly expected decision in the matter of the appeal of the Detroit Citizens' Street Railway Company from the decision of Judge Taft, was handed down at Nashville by the United States Circuit Court of Appeals on the second of October last.

Probably no case has attracted more attention in Michigan or has been more closely followed by the public generally. The court, composed of Judge Howell E. Jackson, of the Supreme Court, Judge Lurtin, of the Circuit Court, and Judge Sage of the District Court, overruled the former decision in almost every particular. The opinion was unanimous and contained over 9,000 words. The following extract shows the decided view taken by the court:

"A review of that decree (Judge Taft's) presents propositions very grave in character, both by reason of the magnitude of the private interests involved and in that their determination will affect public interests involved in the supposed limitations upon the powers of the municipalities of Michigan. The views entertained by Circuit Judge Taft are as follows:

" '1. That the power to make the grant relied on by the defendants must be found in the train or street railway acts, or not at all.

" '2. That the power conferred by those acts to grant an easement in the streets to a street railway company is not an express, but an implied power.

" '3. That the power implied must be limited to the necessity which gives rise to its implication.

" '4. That an inevitable limitation thus arising is that the easement shall not endure beyond the life of the franchise for which the easement is given.

" '5. That the corporate life and corporate franchises originated under a general law which limited their continuance to a period of 30 years.

"'6. That it, therefore, followed that the power of the City was limited to the grant of an easement of way in the public streets not exceeding in duration the corporate life of the company receiving the grant.'"

"The eminent counsel also argued that it was not within the corporate power of the Detroit City Railway Company to receive a street franchise for a term extending beyond its corporate franchise. We cannot at all agree to this proposition. The duration of any estate which such a corporation may take must depend upon the language of the grant and the power of the grantor to make it."

After citing the New York Court of Appeals on this point the court continued:

"We are clearly of opinion that the power of the Detroit City Railway was not restricted to the taking of such a grant for a term limited by its corporate life. The fact that it could not personally enjoy the interest thus granted after the expiration of its substantial and corporate franchises would not cut down the estimate granted. Its power of alienation was unaffected and its assignee, if otherwise endowed with the franchise essential to the operation of the street railway, might enjoy the rights and privileges derived by assignment. There is nothing in the nature of the property rights involved in a grant of an easement in the streets for street railway uses which distinguishes it from any other property acquired by a corporation in the exercise of its franchises.

"But it by no means follows that because the Street Railway Company had the capacity to take an easement in the street for a term extending beyond its corporate franchises, that the City had the power to make such a grant." . . . .

"The power of the City in such matters, is not to be determined solely by the power of the grantee to receive the interest attempted to be conveyed."

This decision, however, was not destined to end the controversy. Shortly after it was rendered, application was made to Attorney General Ellis to remove the case to the State Supreme Court by quo warranto. The matter was under his consideration until the 26th of October, when he announced, to the general surprise, that he would not grant the application. He accompanied the annoucement by an elaborate statement in which he sought to justify his refusal. It amounted practically to this: That the Attorney General, under the statutes and rulings of the Supreme Court, is allowed to exercise his own discretion in granting or refusing to grant applications for the writ of quo warranto. And that, as in his opinion the franchise of the Company was valid, in refusing the application he was simply exercising his lawful discretion.

While it is undoubtedly true that a certain amount of discretion is allowed the Attorney General in determining whether or not he will take a case to the Supreme Court, we seriously question whether it extends to cases involved in such uncertainty as the present one. If his decision were decisive it would at least have the merit of ending the dispute. But it will only delay the final settlement of the case, and will benefit neither party.

RECENT SUPREME COURT DECISIONS.

ACTION AGAINST CITY OF DETROIT—FAILURE TO PRESENT CLAIM TO COMMON COUNCIL BAR TO ANY ACTION.—One who has any demand or claim against the City of Detroit, must in compliance of section 17, chapter 5, of the charter of said city, present such demand or claim to the Common Council of said city for allowance and wait a reasonable time for its decision, before beginning any proceeding against the said city. *Springer* v. *City of Detroit.*

CONTRACTS—RECOVERY FOR SERVICES UNDER AN IMPLIED CONTRACT—PRIVITY OF CONTRACT.—If one voluntarily takes the benefit of another's labor the law implies an obligation to pay for the same. So *held* when one carried a railway company's mail to and from the company's depot and the postoffice supposing that he was obliged to do so by his contract with the government. *McClary* v. *Michigan Central R. R. Co.*

DEED—RESERVATION OF LIFE ESTATE TO A STRANGER TO THE DEED.—While the general rule is that a reservation in a deed in favor of a stranger is invalid as a reservation, still it will be construed to be an exception to the grant and valid if such was the manifest intention of the parties. *Martin* v. *Cook.*

INSURANCE COMPANY—FRAUD AGENCY.—1. The fraudulent intent of a husband in attempting to deceive an insurance company into paying a greater sum than the loss will not defeat the recovery of the wife for the loss actually sustained, although the policy provided any misrepresentation or fraud by any legal representative of the insured should render void the entire policy. And this also, though the wife had executed a power of attorney to her husband authorizing him to act for her in settling the loss. 2. The term "legal representative" in a policy was construed to refer to those who succeed to legal rights by reason of death or transfer of the policy, and not to include anyone authorized to act for the insured. (Justice Grant dissenting.) *Metzger* v. *Manchester Assurance Co.*

INSURANCE POLICY—"CONTENTS IN" WORDS OF LIMITATION OF RISK.—An insurance policy covered a barn and tool house and the "contents in same." After the policy was taken the contents were removed and stored in a new barn which was uninsured. The latter together with all it contained was destroyed by fire. *Held*, that the policy did not cover the articles when removed, as place and location are of the essence of the risk. *Benton* v. *Farmer's Mut. Ins. Co.*

LANDLORD AND TENANT—WHAT THE POSSESSION OF TENANT NOTICE OF.—While the possession of a tenant is notice of his own rights as lessee, it is not notice that the property has been incumbered by an assignment of such lease. *Steele* v. *De May.*

NUISANCE—DISCHARGE OF NOXIOUS SUBSTANCES IN PUBLIC SEWER.—Percolations through the soil into a sewer, of a fluid the gases of which are pernicious, and the retention of which are practicable, is an actionable nuisance to one suffering thereby. *Brady* v. *Detroit Steel and Spring Works.*

VERDICT BY LESS THAN TWELVE JURORS IN CONDEMNATION PROCEEDINGS.—Where in condemnation proceedings it was stipulated by the parties upon the non-appearance of one of the jurors, to proceed to trial with eleven jurors, *held*, that the judgment rendered according to their verdict should not be disturbed as the requirements of the statute were substantially complied with.—*Borgman* v. *City of Detroit.*

LAW SCHOOL NOTES.

Prof. Floyd R. Meachem is announced to deliver a lecture in the Unity club course this winter on "The Origin of Some Familiar Institutions." Prof. Thompson will appear in the Inland league course, and Prof. Knowlton is giving a course of lectures on Jewish law at the Baptist Sunday school.

The registration of the law department now numbers 586, only 11 less than the whole number enrolled last year. Inasmuch as many students will enter between now and the beginning of the second semester in February, there is a probability that the increase prophesied a month ago will actually occur. Undoubtedly the prospective inauguration of the three years course has influenced some to come to the school this year, who would otherwise have postponed the beginning of their law studies until later.

The recitation work on the basis of the lectures is divided between the three instructors this year as follows: Mr. Hughes—Fixtures and easements, Domestic Relations, Torts, Evidence, Equity, Criminal Law and Criminal Procedure; Mr. Dwyer—Constitutional Law, Wills and Administration of Estates, Common Law Pleading and Practice, Bailments and Carriers, Federal Jurisprudence and Contracts; Mr. Smith—Personal Property, Agency, Partnership, Corporations, Husband and Wife, Real Property, Municipal Corporations and Private International Law.

On October 1st, Mr. E. F. Johnson, instructor in the department and secretary of the faculty, issued, through the West Publishing Company, of St. Paul, a new edition of Bliss on Code Pleading, which will be known as the third edition. Mr. Johnson has had charge of the work in this subject here for four years, and his experience as a teacher has enabled him to incorporate into the new edition a number of features which are valuable from a pedagogical point of view. The citation of leading cases for study, and the printing of such cases in bold face type in the notes, will commend itself to all who are familiar with the results of a similar feature in Prof. Knowlton's edition of Anson on Contracts. Again, at the head of every paragraph, there appears a concise, but full statement of the topic of that paragraph. Mr. Johnson has made many valuable additions to the notes and has introduced an entirely new chapter on the subject of The Extraordinary Legal Remedies. The work throughout has been well done.

For the first time in the history of the department, a systematic course in Roman law has now been introduced. This work will continue

during the greater part of the first semester, and will be given to the post graduate class. It is in charge of Mr. C. L. Meader, instructor in Latin in the literary department of the University, who has conducted during the past year a course in that department on the Latin texts of the Roman law. In his law school work, Hammond's edition of Justinian's Institutes has been taken as a basis, but essays will be required involving independent research. From his thorough acquaintance with the Latin language and Roman institutions, Mr. Meader is peculiarly well qualified for the treatment of this subject.

In his introductory remarks to the class, Mr. Meader said: "It is the custom to overlook the study of Roman law in legal education. That subject is coming to be regarded as a relic of antiquity—as a luxury rather than a necessity. Such a position is radically wrong; and great law schools are beginning to wake up to the importance of the study. It is true that it has not the same practical advantage to the American student as to the student of Germany or France. But Roman law plays an important part in the composition of the legal systems of England and America. I would cite the example of the English testamentary law. And it is true that the first English judge who took occasion to decide a case in the law of Bailments based it on the principles of the Roman law. It is not too much to prophesy that the code of Justinian will be taken as a basis of the future American code.

"As in the physical world there are laws which are inevitable, so in the realm of intellect and morals there are laws as inevitable which direct the progress of civilization. This is true of literature and art, and is eminently true of law. The study of Roman law in England laid the foundation for the study of Jurisprudence in that country. In the study of this law, you are studying something which is alive and influential to-day. Its study forms part of the education of a well-rounded lawyer."

The discussion of law school methods is in the Ann Arbor air. Last spring, two members of the law faculty visited a number of the eastern schools for the express purpose of investigating the methods there employed. The chief fruits of this expedition will not appear until the new three year course is announced, but minor changes are already observable. There is a tendency to require a more systematic study of cases in connection with the lecture and text-book work. This tendency does not necessarily indicate that there is a leaning toward the case method as used by Harvard and Columbia, but it may not unreasonably be construed as a recognition that cases, as the ultimate authority for the unwritten law, must be considered in a mature system of legal education.

There is, however, in the way of the introduction of case study on this plan, a difficulty growing out of the large number of students in the school. Let three hundred men be directed to prepare themselves thoroughly on ten cases, the library containing but one copy of each, and give these three hundred one week in which to read the cases; it is more than probable that many students will be unable to secure the assigned volumes. This difficulty may perhaps be obviated by the purchase of a large number of duplicate volumes of selected cases for the library, or it may lead to the adoption of a rule requiring each student to purchase a compilation of cases for his own private study. It is suggested by a

member of the faculty that all the cases required throughout the course might be collected into a volume, and thus brought within the means of the average student.

The establishment of a practice court is another element in the gradual transformation. It is probable that in the machinery of this tribunal there is found something as near to the actual practice of the actual courts as it is at this time practicable or necessary to attempt.

Another step is that towards raising the standard for admission to the department. Up to only a short time ago it was the policy to require only such a test as was necessary to determine whether or not, the candidate was competant to appreciate legal principles. And even such technical tests as were adopted were always applied liberally in the interests of the candidate. There is a wholesome change toward a higher standard now. A large part of Blackstone's Commentaries is required for admission, as well as a competent knowledge of English and American history. If this prior reading in Blackstone is done in such a way as to cause the candidate to think—in such a way that he is aided to understand our law as a system—in such a way that he is inspired to become a scholarly student of the legal system of America in its relation to that of England at Blackstone's time—then it is well.

But there is no general rule that can meet the demands of all cases. And I do not understand that it is the policy to turn away any student of promise by establishing this standard. It is rather to induce all, whether of brilliant or mediocre ability, to do some reading in the law on their own responsibility before they come into the discipline of the department here.

When all has been said, it must be acknowledged that there is good in each of the prevailing methods of legal education. In the words of Judge Dillon: What Pope said of forms of government may, I think, be said with more justness of methods of teaching—"that which is best administered is best." Harvard and the old faculty of Columbia developed their distinctive types. Whether there will, at length, come into existence a method peculiar to Ann Arbor, and what that method will be, are largely matters of conjecture. It is certain, however, that a transformation is going on, and thus far it has not been for the worse.

BOOK REVIEWS.

THE AMERICAN DIGEST—Annual, 1894, being volume 8 of the U. S. Digest, third series annuals. Also the complete digest for 1894. A digest of all the decisions of all the United States courts, the courts of last resort of all the States and Territories, and the intermediate courts of New York State, Pennsylvania, Ohio, Illinois, Indiana, Missouri, Texas and Colorado, United States Court of Claims, Court of Appeals and Supreme Court of the District of Columbia, etc., as reported in the National Reporter system and elsewhere, from September 1, 1893, to August 31, 1894. With notes of English and Canadian cases, etc., a list of the reports included, a table of the cases digested, and a table of cases overruled, criticised, followed, distinguished, etc., during the year. References to the State reports, given by an improved method of topical citation. Prepared and edited by the editorial staff of the National Reporter system. St. Paul, Minn.: West Publishing Co. 1894.

To assume that there is a lawyer in this country who does not know full well the value of the American Digest would be rediculous. To give any very extended review of the many merits of this wonderful work would be an unnecessary expenditure of time, space and printer's ink. This is the fourth volume that has come to us for review. After examining each volume the involuntary exclamation has invariably been, "Well, what next?" Each volume is a little larger and approaches a little nearer to perfection than its predecessor. This volume, containing 2,716 pages of closely printed and well arranged matter is almost a library in itself.

FITNAM,S TRIAL PROCEDURE—A Treatise on Procedure in Civil Actions and Proceedings in Trial Courts of Record under the Civil Codes of all the States and Territories. By JOHN C. FITNAM, Esq., Counsellor at Law, St. Paul.: West Publishing Co. One vol., 8 vo, 867 pp. $6.30.

"What to do, how to do it, and what not to do, in civil actions and proceedings in trial courts of record." This is a sentence inscribed upon the title page of this work. On it is comprised the objects of the work. There are several works on codes and code pleading, nearly all of them very good as far as they go, but in none of them can be found much of the valuable matter relative to procedure in civil actions in courts of record which is contained in this book. The claims of the publishers that it is a reliable "handbook of procedure" will be found to be thoroughly substantiated upon a careful examination. The author treats with precision questions of procedure at all stages of the civil action, and supplements the text with authorities upon each, which he has evidently gathered with much care from a great mass of reports. He has arranged his text in a most admirable manner. There are 670 sections and 76 chapters. The first 21 chapters contain considerable valuable matter which other authors have given very inadequate treatment, but which should be carefully studied in order to thoroughly understand what follows. These chapters treat of the courts, their jurisdiction, organization, powers, officers, etc., also the appellate jurisdiction of trial courts,

and the proper action to be taken by each party under the several circumstances that may arise during the pendency of the action. The balance of the work treats of the procedure in a civil action, from the issuing of the summons to the taxation of costs. The thoroughness with which the author has treated every detail of his subject and the logical manner in which the text has been arranged are two of the most commendable features of the work.

DWIGHT ON PERSONS AND PERSONAL PROPERTY—Commentaries on the Law of Persons and Personal Property, being an Introduction to the Study of Contracts. By THEODORE W. DWIGHT, late Professor of Law at Columbia College, New York. Edited by EDWARD F. DWIGHT, of the New York Bar. Boston: Little, Brown and Company. One vol., 8 vo. 810 pp.

Professor Dwight was regarded by many as one of the most capable legal educators and law writers. His lectures before the Columbia Law School were models of excellence, and were one of the best features of the instruction given by that institution. Upon the topics included in his lectures preceding the course on contracts this work is based. It is intended as an introduction to the law of contracts, and had he been able it is probable that he would have prepared a most thorough and exhaustive treatise upon the whole subject of contract law, with the matter included in this work as the introductory portion. The volume includes two books, the first upon the law of persons and the second upon the law of personal property. "In the law of persons," as stated in the preface, "the grand division of absolute and relative rights is observed throughout. The former class is divided into the rights of personal security and personal liberty, while under the latter and more numerous class of relative rights are considered those which spring from the relations of husband and wife, parent and child, guardian and ward, and master and servant. Separate chapters are devoted to citizens and aliens, infancy, the doctrine of status as affecting capacity, and finally to corporations, which closes the first book." Book two is divided into three parts, under the first of which is considered property in general and the limitations to its ownership. This is done in four chapters upon the nature of property, the distinction between real and personal property, things not the subject of private ownership, and the qualifications of ownership. In part two distinctions peculiar to personal property are pointed out. And in it are considered attributes of ownership, including the power to use, sell, exchange, etc., the distinction between corporeal and incorporeal personal property, and various distinctions of ownership. Part three treats of title to personal property, in two chapters, one upon title by original acquisition, and the other upon title by act of the law, each under several appropriate divisions and sections. The arrangement of the work is most excellent, and it has been well edited. The name of the author is sufficient guaranty of its literary excellence, while that of the publishers insures the best mechanical construction.

ELLIOTT'S GENERAL PRACTICE—A Treatise on General Practice, containing Rules and Suggestions for the Work of the Advocate in the Preparation for Trial, Conduct of the Trial and Preparation for Appeal. By BYRON K. ELLIOTT and WILLIAM F. ELLIOTT, authors of a Treatise on the Law of Roads and Streets and of a

Treatise on Appellate Procedure. Indianapolis and Kansas City: The Bowen-Merrill Company. Two vols., 8 vo. 1,760 pp. $12.00 net.

The October *Law Book News* contains an interesting editorial comment upon the recent and almost simultaneous advent of several works upon pleading, practice and procedure. It concludes: "If the young and inexperienced practitioner, who seems to be the special object of these good authors' solicitude, devotes himself as conscientiously to the study of these works as the writers have in their preparation, why, what a very practical young practitioner this practical young practitioner will be!" Doubtless some of the books referred to would not have been greatly missed by the profession if they had never appeared, but this work is not one of that kind. The book by the same authors, of which this is practically a new edition, has so favorably impressed the members of the profession, and many outside the bar who have found it most interesting reading, that the issuing of innumerable other books of the same character can in no way lessen the firm hold which it has obtained upon its readers. In 1888 "The Work of the Advocate" was published. It was original in every sense of the word, and treated of matters not usually discussed in works on pleading and practice. The avowed intention of the authors was to treat "more of the things that abide in the unwritten practice than of those which are found in books." This book met with great popular approval, so much so that it has been out of print for more than five years. Yielding to repeated requests they have taken that excellent material for a foundation and enlarged it into a treatise on general practice, filling two large volumes. Volume one is upon the advocates work out of court, in preparation for trial, while in volume two is considered the advocate's work in court, or trial practice. Judge Elliott's reputation as a jurist of rare good judgment, general wisdom and legal acumen, together with his long experience upon the bench, has especially fitted him for the preparation of a work of this character. He has been a close student of men and of human nature. His many suggestions and instructions for learning and preparing the facts for trial, the method of obtaining the law of the particular case, the framing of the theory of the case, and all other preliminary steps in the preparation for trial, are entitled to the greatest consideration. Scarcely less important is the portion upon trial practice, in which all practical questions which may possibly arise during the conduct of a case, from the appearance to the preparation for appeal, after judgment and decree, are thoroughly discussed in a most entertaining manner. There are 1,244 pages of text, a complete table of contents, a table of cases cited, and a comprehensive index, making in all 1,760 pages.

CURRENT LITERATURE.

The September number of the *Medico-Legal Journal* contains some very readable articles. We noticed in particular the article on Medical Witnesses, which should be of interest to lawyers and doctors alike. The editorial on Ingersoll's Justification of Suicide is logical, and forcibly written. It is pleasing to see that the fallacies of that "monarch of words" are not allowed to go unrefuted. If more pains were taken to show the true nature of such attempts they would be practiced less.

Two notable educational articles are contained in *The Popular Science Monthly* for November. Mr. John F. Casey writes upon "Preparation for College by English High Schools," and Dr. C. Hanford contributes the first of two articles on "Manual Training." Under the title, "Unsolved Problems of Science," is given the recent address of the Marquis of Salisbury upon assuming the presidency of the British Association for the Advancement of Science. (New York: D. Appleton & Company. 50 cents a number. $5.00 a year.)

D. M. Frederiksen has a strong defence of "Compulsory Arbitration" in the November number of *The American Journal of Politics*. J. Castell Hopkins gives an interesting comparison of the United States Senate and the English Lords. A vigorous article on "The Threatened Revival of Knownothingism," is by Charles Robinson, and Dr. Frederic Clemson Howe contributes a valuable review of "Commercial Depressions and Business Crises." (New York: Andrew J. Palm & Co. Single copies 25 cents. One year, $3.00.)

The November *Forum* is of especial interest just at this time. Ex-Senator Edmunds discusses the questions of the popular election of United States Senators. An anonymous writer contributes the leading article, "Political Career and Character of David B. Hill." Two of the other articles of more than usual interest are: "Impotence of Churches in a Manufacturing Town," by the Rev. W. B. Hale, and "The Wage Earners Loss during the Depression," by Samuel W. Dike. (New York: Forum Publishing Co. 25 cents a copy. $3.00 a year.)

"The Business Revival," forms the subject of a valuable symposium which appears in the November number of the *North American Review*, the contributors being the Presidents of the Chamber of Commerce at Boston, Cincinnati, New Orleans and St. Louis. Senator John L. Mitchell, of Wisconsin, describes the course of a bill through Congress in an entertaining and instructive manner, and the Rev. Bishop Merrill has an able article, both of historic and present interest on the "Evolution of Political Parties." (New York: North American Review. Single numbers 50 cents. Per annum $5.00.)

The November *Atlantic* is brim full of good things. Frederic Bancroft contributes an interesting article, "Seward's Attitude Toward Compromise and Secession, 1860-1861," and J. M. Ludlow on "The Growth of American Influence over England." Perhaps the most interesting and timely of all is the one entitled "Tammany Points the Way," by Henry Childs Merwin, who treats in a forceful manner the municipal mis-government in the United States, and makes some striking comparisons. Munici-

pal reformers will all want to read it. (Boston: Houghton, Mifflin and Company. Single numbers 35 cents. Yearly, $4.00.)

The November *Review of Reviews* contains a finely illustrated article upon "Legal Education in the United States," by Lynn R. Meekins. Among the several portraits with which the article is illustrated that of the Hon. Thomas M. Cooley is very appropriately given first. The other legal educators whose pictures are given are Austin Abbott, LL. D., the late William G. Hammond, President Henry Wade Rogers, the Hon. Simeon E. Baldwin, Prof. James B. Thayer and George M. Sharp, Esq., Secretary Section on Legal Education of the American Bar Association. It also contains the usual amount of other interesting and timely matter. (New York: Review of Reviews. Monthly 25 cents. $2.50 a year.)

LEGAL FACETIAE.

"Brother Pyles," said a judge, "you have repeated that argument about the prisoner's innocence 12 times.

"Your honor, I have 12 men to convince," returned the lawyer.

One of the wittiest as well as one of the most brilliant men Pennsylvania has produced was the late George W. Barton who once occupied a seat on the bench. Trying a case before a judge who was chiefly remarkable for obtuseness, he took occasion to say that he had often seen a great ass in judicial robes. "You speak from experience I suppose," was the angry retort. "Not at all," replied Judge Barton, "I am speaking from direct observation."

The learned and popular Judge B—, once on the supreme bench of California, was recently trying a case where a farmer claimed damages against a mining company for blowing vailings on to the farmer's land. A witness testified as to the effect of a stick lying in the stream carrying the vailings and obstructing the same.

JUDGE B—, (to witness). "How large was the stick you speak of?"

WITNESS. "I don't recollect."

JUDGE B—, "Can't you approximate to the size?"

WITNESS. "Well, no; I didn't measure it."

JUDGE B—, (growing impatient). "Well, sir, was it as thick as my wrist?"

WITNESS. Well, yes, somewhat larger; from my recollection now, I should judge it to have been about as thick as your head."

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THE MAKING OF OUR LAW.

ALFRED RUSSELL, LL. D.

In the most famous judgment hall in history, Pilate put the question, "What is truth?" No answer is recorded. The inquiry, what is law, is nearly as difficult to reply to. The proper mode of examining the subject is historical investigation. History and law are related themes. The first serious work of the historian Gibbon was a copious and critical abstract of Blackstone as a preparation for historical labors. The making of our law is, and always has been, progressive. Civilization, that is, human improvement, advances; and law is a great part of civilization. The jurisprudence of one age is history in a later. Our law was originally called the customary law. It sprang from the sense of justice and the power of reasoning implanted in man by his Maker. Who set forth reason and justice, in their application to the affairs of men? This has been done by the judges, from the earliest time in Britain, down to the present time in America. It has been done when deciding particular facts in actual controversies. The genius of English-speaking people is intensely practical. They have always treated law as a business and not as a theory. They have been chary of establishing rules of conduct in advance, and have preferred that such rules should be unfolded from actual facts, which necessarily create the law to be expounded. The judges have, indeed, in reaching the disposition of the case, not infrequently given reasons and explanations, and stated principles; but this has been done in the way of opening out the legal relations of the facts, and not in the way of declaring general rules. Nor have the English judges, parliament, or people, ever favored code-making.

Let me illustrate by a modern case in the Queen's Bench, where the judgment was by a gifted and eminent judge, Sir John Taylor Coleridge, in 1858. (*Blakemore against the Bristol and Exeter Railroad, 8 Ellis & Blackburn, 1051*). Blakemore's administratrix brought an action for an injury sustained by him which caused his death. The railroad company had stipulated that consignees of goods should unload them at the station.

and allowed the free use of a crane, which was unsafe, as the company knew; and the crane broke, killing the decedent, who was helping unload. The company's defense was, that the use was gratuitous, but the court held that there was a liability for mischief resulting from the known unsafe condition of the article lent. The judge could find no authority in the English reports or treatises, but he found the principle in the Roman law, and said: "*This is so consonant to reason and justice that it cannot but be a part of our law.*"

Golden words! Can you codify reason and justice? No; because you cannot know what reason and justice will be in a particular case until after the facts have arisen which invoke the application of reason and justice.

A century earlier, a question arose as to the construction, force, and effect, of a power, presented in a case on a special verdict in ejectment: and the great Mansfield said, in the King's Bench, after referring to several precedents: "*But there are no precedents which can stand in the way of our determining* THIS *case liberally, equitably, and according to the intention of the parties.*" (*Woolston against Zouch, 2 Burrow, 1147.*) In the year 1756 referring to the cases of that period, Mr. Burrow, the reporter, said: "The authority of right judgments, on right principles, given unanimously, by judges who add weight and dignity to the highest offices, instead of deriving any from them, is so great, that the point determined becomes a rule forever."

It has always been true that the judges would refuse to decide moot cases; and where a case had been settled while in litigation and before judgment, the judges would never render any opinion.

Britain was a province of the Roman Empire for nearly five hundred years. Then followed the Saxon invasion. Many centuries after the Saxons came the Normans. The making of our law began during the long period of the Roman occupation, which left an indelible impress. During that time the refined jurisprudence of Rome attained its fullest development; and it is now generally considered that from that jurisprudence we derive the better part of the principles of our law. It has been said that the history of our law from the time of the Saxons is a history of the struggle between the principles of reason, represented by the Roman law, and the principles of custom represented by the usages of the barbarians. For example, the principle that what long use sanctions becomes law without being written, is of Roman origin. (*Justinian, lib. i, tit. ii, s. 59.*) So, the principle that a man may not repossess himself of his property by force, but must use process of law. (*Lib. iv, tit. 15.*) Trial by jury itself, generally thought to be the one legal institution of purely British origin, really was the product of the Roman system of trial, according to Montesquien, (*Spirit of Laws, xi. c. 18,*) and according to Phillimore, (*Introd. to Roman Law, 17, 19.*) The Roman jurors, called

judices, answered the questions of fact, and the Roman praetors, corresponding to our judges, answered the questions of law, just as in our still existing system in England and America. The law concerning municipalities may be traced to a distinctly Roman origin.

Judicial legislation, for such in reality is the deciding of cases by judges, began to be known as early as the age of Alfred. Such legislation was then a branch of executive authority; and that amiable prince, it is related in the *Mirror of Justice*, hanged forty-four judges in one year for rendering judgments not according to his notions of reason and justice. It was not, however, until the commencement of the issue of annual reports, called the Year Books, that judicial legislation took on what is substantially it's existing form. This was in the time extending from Edward II. to Henry VIII. It may be said that the era of our modern law began with the reign of his daughter Elizabeth,—that reign so fruitful of marvels, in arms, navigation, literature and law. But, to understand the post-Elizabethan law, it is necessary to study the previous development. The general distinction between the periods is, that in the former the ownership of land was the passport and patent of respect and the principal subject of litigation, while the latter is marked by the rise and predominance of the commercial spirit; and now vast wealth is in the form of personal property, which is chiefly litigated about, and a piece of land is transferred with as little formality as a horse.

The books of the law began to be in English, and to be printed, in the fifteenth century, and the making of our law was then greatly facilitated. In the Year Books began the great improvement of putting spoken law into writing. The reporters were employed and paid by the crown, to take notes in the courts, and publish them annually. Very much of our received law is found in these publications. For example, the law that the sheriff cannot break the outer door of a dwelling house to levy an execution. (*Year Book, 18 Edw. IV, fol. 19.*) The point of the Six Carpenters' Case, 8 Coke 147, that one who abuses an authority in law, is to be deemed a trespasser from the beginning, was determined a hundred and thirty years before. (*Year Book, 21 Edw. IV, fol. 19, pl. 22.*) The law that ratification is equivalent to previous authority, is found very early. (*Year Book, 7 Henry IV, fol. 35.*) The maxim *res inter alios acta non nocet*, (*Year Book, 3 Edw. II, 53.*) *Modus et conventio vincunt legem*, (*Year Book, 5 Edw. II, 161.*) *Novo casu novum remedium.* (*Year Book, 18 Edw. II, 400.*) These maxims the judges adopted from the Roman law, and made them English law, because they reflect reason and justice. Action of account for money received on sale of plaintiff's goods. (*Year Book, 46 Edw. III, fol. 3.*) Action on the case against a farrier for laming a horse. (*Year Book, 36 Edw. VI, fol. 19.*) Action on the case against a surgeon for malpractice. (*48 Edw. III, fol. 6.*)

Statements of principles, when made by the judges, have been in

reality, statements of what should govern the particular facts, and should always be read with reference to those facts. Such general statements are frequently found *not* to govern other facts.

We have now seen that the method of the making of our law has been, first and foremost, by judicial declaration, which has always been treated as the equivalent of legislation, and has in reality been legislation itself. A second method of making our law has been by juristic writings. That is to say, studious lawyers have examined the decisions of the judges, extending over centuries, (and a century is a short time in the growth of our law), and have extracted, classified and arranged the principles conceived to underlie the disposition of the actual cases; and have commended some and condemned others; and have accordingly contributed somewhat to render our law a science, as well as an art. The composers of these juristic writings have also reflected the national English trait of not theorizing about law, and have in general, merely stated law which had been developed and enforced in actual controversies. These treatises have supplemented the adjudications, by pointing out and explaining grounds and analogies as might have been done (when not done) by the authors of the adjudications. The reflex influence of the law-writers upon the judge and also upon the legislator has been great and beneficial, so much so indeed, that many of the authors of our text-books, from Bracton to Cooley, may well be termed makers of our law. They make the law by teaching those who have the power to declare and to enact. The field of usefulness of such writers is already very wide, but is capable of great expansion. Indeed, we must rely mainly on individual labor for any great improvement in the law.

A third method of the making of our law is, and has always been, professional opinion. The legal body, from the earliest ages, has been the depository of law-learning, and has been so recognized by the mass of the people of every condition; and from it the bench is constantly recruited. Their advice, in every local community, has shaped actual transactions, and disposed of them. Often the whole business life of a particular locality has formed itself upon it. When affairs arising under such circumstances have come into litigation, judicial judgment has almost certainly followed the prior professional view. Under all circumstances, the reasoning, arguments, analogies, and illustrations, supplied by the opposing counsel before the judges, have contributed as much, or more, to the ultimate result, as the reflections, examinations and conferences of the judges themselves. Counsel have, indeed, better opportunities for studying the particular controversy than the judges can possibly have, hearing the facts as they do for the first time in the hurry and press of business. So that one chief care of counsel is to see that the judges possess themselves of the facts accurately and thoroughly. It is certainly true that English-speaking people have always valued, and supported, an

upright, watchful and intelligent bar; and have relied upon them to advise the people, the legislature and the courts. The courts uniformly do lean, and must lean, upon the bar; and the memorable case of parliament applying to John Selden for advice was by no means a single instance. In general, the bar has shown itself worthy of the confidence reposed in it. To so great a degree is the bar responsible for the decisions of the courts, that Jeremy Bentham, in his diatribes against what he calls judge-made law, includes the bar as associate makers, and uses the derisive phrase "*Judge & Co.*" to designate the makers of judiciary law.

By far the greater part of our law has been and is made in the three ways already pointed out, by the judges, the jurists, and the bar; and this greater part of our law has been made after men have acted, and in determining the effect of their actions. But there is a fourth method of making our law, and making it beforehand; that is, the enactment of the legislature, setting out general rules of conduct, to be observed subsequently. This method is generally meant when law-making is spoken of, although it is, in reality, the least important method of law-making. There is a series of great historical statutes passed in the mother country, from century to century, to cure supposed defects, as occasion has arisen, but the limits of this magazine article will not permit me to enumerate them. And this process of supplying statutory remedies, from time to time, is also illustrative of the marked national trait of the people of Britain, heretofore referred to. of looking at all things in a practical business way, and avoiding theoretical action. A single statute can be viewed by a legislative body independently, and on its own merits, and therefore intelligently and justly; while a mass of legislation, called a code, can only be created by a commission and adopted bodily by the legislature. Such a mass, called a code, will reflect the theories of the framers, and does not spring from the judgment of the representatives of the people, exercised upon special instances and needs, calling for early relief. The latter method of supposed improvement has always been, and is now, the English method, and, happily, has been incorporated into the constitution of Michigan, and has always been followed in our statutes. (*See. 2 Mich. Law Jour., p. 268.*) Where single statutes, upon the same or related subjects, have accumulated, they have been re-written, reduced, and consolidated into one statute. The tone of English law-making has always been hostile to any attempt at a codification of the whole mass of the law, and has confined itself, as above stated, to the process of digesting enactments relating to one subject, as occasion has demaded. The earliest example of this is the Statute of Laborers and Artificers, (*5 Eliz., chapter 4*), which recites that there stand in force a great number of acts which, partly for their imperfection and contrariety, and partly for the variety and number of them, cannot be put in due execution, so the substance shall be digested and put in one sole law and statute.

In the time of the Commonwealth a commission was created composed of learned men, and members of the House of Commons, including the great names of Cromwell and Hale, which sat for five years; and, after the Restoration, there was another commission, made up of fifty-one members; and, in 1828 and 1844, similar movements were made; but little or nothing of importance came from any of them. We may justly infer that the striking indisposition of the people of the mother country to adopt anything not confirmed by the growth of centuries, and proved by actual use in the affairs of men, lay at the bottom of the failure of all these attempts at a sort of codification. It is highly probable that this indisposition will continue. It is the product of eight or ten centuries.

But the habit of alteration and correction by individual statutes, and the habit of consolidating such statutes upon related subjects, has been kept up from Elizabeth to Victoria, and has been followed in America. A modern English example is found in the Railway and Canal Traffic Act of 1852, regulating a portion of the law concerning carriers. This act, moreover, illustrates in a remarkable manner the predilection of the English people for the system of making law by judges, according to the requirements of the particular facts. The act provides that notices and conditions, made by common carriers, shall be void, unless the individual judge, at the trial, shall deem the notice or condition just and reasonable. In other words, this statute of the last half of the nineteenth century, expressly authorizes the judges to do just what they have practically been doing from a time anterior to the Year Books; namely, to decide the controversy according to reason and justice. If Jeremy Bentham, or David Dudley Field, had had the framing of that statute, it would have been a set of rigid and inflexible rules, incapable of adaptation to new combinations of facts. It is impossible to formulate any rule or principle which will be of universal application. Another modern instance of digesting appears in the English act of 1882, as to bills and notes. This statute codifies the technical and statutory rules on the subject, but makes no attempt to cover the whole law relating to it. On the contrary, it declares that the existing law shall remain, when not inconsistent with the digested statute.

This topic of commercial paper furnishes a conspicuous example of how our law has been made. The merchants first established such customs as the convenience of their business required. Mansfield, the head of the court of King's Bench, took up these customs and made them the law of the land. Then parliament passed statutes, from time to time, declaring or altering the judiciary law, and finally enacted the consolidated law of 1882, covering a considerable part of the subject.

Growth, and judicial legislation according to the changing activities of business, and not legislative regulation, according to some theory of what the law ought to be, has been the method of the making of our law

from the Roman occupation of Britain until now The needs and opinions of men vary insensibly from one age to another. These alterations are known by the judges and shared by them. And so the law which they make progresses by imperceptible degrees. Sharp and sudden changes by statutes have always been disfavored.

This method of the gradual making and advancement of the law, according to the characteristics of the age, and the justice of the case, by a trained and instructed body of men, set apart for the purpose, has always been preferred by the English people to code-making, by the sort of men who compose the legislature, or by commissions. We have in our own country, at the present time, a general distrust of our State and national legislatures, and this is sometimes wondered at. But it is an inherited distrust. It comes from our English ancestors. The negligences, imperfections and mistakes of the narrow nobles and country squires, often brutal and ignorant, who made up the early parliaments, and the commercial and laboring men introduced into the later, have produced laws far less satisfactory to the people than the judicial legislation of the bench. Nothing more useless, grotesque, or harmful has been exhibited in our newest States in the way of legislation than we see in the English records. And we have only to read Sir Erskine May's Constitutional History to see that no legislative jobbery in America has approached that of England. While in both countries judicial law-making has generally been free from the vice of ignorance and free from the vice of corruption. In both countries, the people have always shown, and now show, as much confidence in the law-making of their judges as they do distrust towards the law-making of their legislators.

The preparation of statutes is frequently by some person who has a particular interest in view. The bill is drawn by one, not a lawyer, whose vision does not extend beyond that object. Often, also, parts of prior statutes are tacked together and new matter interspersed. In each House alterations and additions are made. The result is, as Lord Brougham said, (*Works, Lond. Ed., 1857, vol. VIII, 208.*) that the scissors of the draftsman make one clause and the pen of the amender makes another. He cites one instance, where, by a notable feat of the legislative scissors, a statute awarded one moiety of the penalty—which was made transportation or whipping—to the person suing for the same; and the other moiety to His Majesty, his heirs and successors. Ill construction is the rule and not the exception.

As the interpretation and application of a statute, of necessity, falls to the judges, they often experience the greatest difficulty in ascertaining the real intention of the legislature. Take, for example, the famous Statute of Frauds, re-enacted probably in every one of our States, thousands of decisions, costing millions of dollars, have been expended in attempts to construe it. And yet that statute was drawn by as great a

lawyer as would ever be employed in composing a code. Many statutes been found to be actually incapable of administration. Austin, professor of jurisprudence in the University of London, in his celebrated lectures, expresses conflicting opinions respecting statutory and judiciary law compared. He says he does not disapprove of the latter; that society could not possibly have gone on without legislation by the judge, to make up for the negligence and incapacity of the avowed legislator; and that that portion of the law made by judges has been far better made than that part which consists of statutes enacted by the legislature. (*1 Lect., Lond. 1869, 224.*) But in another place he says it can never be known whether a judiciary rule is valid law, because uncertainty is of the essence of judiciary law, but that it is not of the essence of statutory law, which, when well constructed and generally approved, is "absolutely certain." (*2 Lect., same Ed., 678.*) On the contrary, the meaning of any statute can never be certainly known until it has been applied by the judiciary. Take, for example, the numerous recent statutes concerning elections, adopted from Australia. Substantially identical provisions have been differently construed in different jurisdictions. Bishop Hoadly said: (*Pamphlet on the Bangorian Controversy,*) "Nay, whoever hath an absolute authority to interpret any written or spoken laws, he it is who is truly the law-giver, to all intents and purposes; and not the persons who first wrote or spoke them." Parliament was always jealous of the constructions placed upon statutes by the judges, and on one occasion, (*Stat. 28 Henry VIII, c. 7, Sec. 28.*) added the following clause to a statute: "And be it finally enacted, that the present act, and every clause, article and sentence comprised in the same, shall be taken and accepted *according to the plain words and sentences therein contained, and shall not be interpreted, nor expounded, by color of any pretense or cause, or by any subtle arguments, or inventions, or reasons,* to the hindrance, disturbance or derogation of this act, or any part thereof, etc."

In this country, where we have constitutional limitations on legislative power, the evil of incompetent law-giving is greater, if possible, than in the mother-country. Austin, at the page last cited, exhibits a curious example of the incapacity of the English lawyer to comprehend the power of our courts to determine the invalidity of a statute when in conflict with the constitution. He says our statutes are habitually over-ruled by the judges and the bar; and, that at the beginning of every term of court, they meet and settle what acts of the preceding session of the legislature they will abide by; and that such is the general conviction of the incapacity of the legislature, and the comparative capacity and experience of the judges and the bar, that the public habitually acquiesces in the proceedings.

Austin and Bentham are both examples of what absurdities a mere closet thinker, not experienced in the ways of men in actual controversies

in the courts, may utter. Bentham was a gentleman of property and leisure, a bencher of Lincoln's Inn, and, no doubt, was one of the greatest minds of the eighteenth century; and he originated some important reforms, such as the making parties witnesses. But his style was unattractive and his temper narrow. Born in London in the first half of the eighteenth century, and having listened to the delivery of Blackstone's lectures, (which he says were generally attended by from thirty to fifty persons), he yet lived to see the publication of Kent's commentaries. He derided Blackstone, and, was angered to read the eulogiums of Kent on the common law, and said he would be glad to see in Kent's work the smallest spark of regard for the ends of justice. (*Bentham's Works, Ed. of 1843, Edinb., vol. X, p. 560.*) This was in 1827, and yet Bentham himself had written and published in 1817, (*Papers on Codif., IV Works, 461*), that all the law-libraries of all the countries of Europe, would not furnish "a collection of cases equal in variety, in amplitude, in clearness of statement—in a word, in all parts taken together, in instructiveness—to that which may be seen in the English Reports of Adjudged Cases, adding the abridgments and treatises by which a sort of order, such as it is, is given to their contents."

Bentham was one of those persons, happily few, who advocate the abolition of all existing law, written and unwritten, and the the substitution of one enactment, called a code, which should include it all, and make it comprehensible by every citizen. The investigation and presentation of particular facts, and reasoning about them, involves labor and thought, and acquaintance with principles and cases, gives a virile training, and lays under contribution the best powers of the intellect; but these persons imagine that such labor and thought and knowledge may be rendered unnecessary by a code.

In response to an inquiry from Parliament, in 1844, the entire body of the superior judges of England, men of great moral worth, intellectual culture, breadth of view, and long experience, joined in recommending that no attempt at codification should be made; and their view undoubtedly represented the English bar and the English people.

Contrary to a common supposition, the Emperor Justinian's code was mainly a consolidation of public statutes and did not codify much private law. The Pandects, containing the latter, were a digest of the writings of recognized jurists. The Prussian Frederick made a code, but did it principally as an attempt to unify the discordant peoples under his rule. The object of the Emperor Napoleon was a similar one, in making his code. It is a significant fact that those three code-makers were all despots, with no conception of freedom according to the standard of the law of English-speaking peoples. Austin says of these codes, what is true beyond question, that they are buried under a heap of amendments and judiciary law, construing and interpreting them, and such also is the experience in New

York. Under the French code, it is said that no lawyer, advising his clients, can conjecture whether the judge will follow a previous judicial view of a code-provision, or some commentator's view, or will extemporize a novel view of his own. The reports of the code-States of Louisiana and California show that their judges and lawyers consult the common law.

The truth is, that uncertainty is of the essence of all law, because every new combination of facts calls either for a new application of the principles of reason and justice, or of some rigid statutory or code provision; and this application depends always on the judge, who may be a very wise and learned man, or a very unwise and unlearned man. And the hope of ever obtaining what Austin calls "absolute certainty," is like the purification of politics, according to Senator Ingalls, "an iridescent dream." But, in spite of all this, on the whole, a great measure of justice is attained, and the community is satisfied. Human nature must be made over before we can expect anything more. And we may close with the lines of the poet:

> "How small, of all that human hearts endure,
> The part which kings, *or laws*, can cause, or cure."

PROPOSED IMPROVEMENT IN MICHIGAN CIRCUIT COURT PRACTICE.

CHESTER L. COLLINS.

At the last meeting of the State Bar Association the writer read a paper submitting: "Some Practical Suggestions on Reform of Michigan Circuit Court Practice," which was afterwards published in the July, 1894 number of this Journal. Following the reading of this article its suggestions were referred to a special committee consisting of Mr. C. P. Black, Mr. Fred Maynard, Mr. E. F. Conely, Mr. E. E. Osborn, and the writer as chairman, to report thereon. Since that meeting Mr. Osborn has removed to Chicago.

The writer has drawn three bills embodying the most of the changes proposed in the paper. They have been submitted to the members of the committee, but by reason of their engagements, no meeting of the committee, and no interchange of views between them has been had. At the request of members of the bench and bar, and for the convenience of the committee, and for the purpose of obtaining criticisms and suggestions from others than the committee, it has been proposed to publish these proposed bills in the MICHIGAN LAW JOURNAL. Of course it will be understood that this publication does not commit any member of the committee, other than the writer, to an advocacy of the changes proposed.

Criticisms and suggestions relating to the proposed bills are invited; and such of them as are sent to the writer will be laid before the committee.

I.

One of the proposed improvements is to permit a defendant to set off a cause of action which he may have against the plaintiff in all cases when the set-off is founded on a contract express or implied.

By striking out paragraph two of section 7365 Howell's Statutes as amended in 1887, and renumbering the remaining paragraphs of that section, this improvement will be effected. One of the proposed bills, which it is not necessary to print in full would effect this improvement.

II.

In order to carry into effect the provisions of the main bill it will be necessary to amend section 8713 of Howell's Statutes. One of the proposed bills would amend that Statute to read as follows:

SECTION 8713. The following actions shall be commenced within six years next after the cause of action shall accrue, and not afterwards, that is to say:

1. All actions founded upon any contract or liability not under seal, except such as are brought upon the judgment or decree of some court of record of the United States, or of this, or some other of the United States;

2. All actions upon judgments rendered in any court, other than those above excepted;

3. All actions for arrears of rent;

4. All actions founded upon any contract or liability, express or implied;

5. All actions for waste;

6. All actions for taking, detaining or injuring goods or chattels;

7. All other actions for wrongs, except those mentioned in the next section of this act.

III.

The main bill as proposed reads as follows:

A BILL,

FOR

An Act to enlarge the powers of the Circuit Courts of the State of Michigan, and to provide for the improvement of the practice therein in actions at law and actions in equity.

SECTION 1. *The People of the State of Michigan enact*, That this Act shall be known and may be cited as the Practice Act of 1895. The word Court, when used in this Act, shall mean and include the Circuit Court in which an action is about to be commenced or is pending. The word Action as used in this Act shall mean and include actions at law and actions in equity.

SEC. 2. Whenever, in any action commenced at law, it appears that the rights of the parties can be better determined and enforced by a decree in equity, the Court may, upon reasonable terms, strike out the pleadings at law, and require the parties to plead in equity in the same action, and may hear and determine the cause according to the practice in actions in equity.

SEC. 3. Whenever, in any action commenced in equity, it appears that the remedy at law is plain, adequate and complete, and that the rights of the parties can be fully determined and enforced by a judgment and execution at law, the court may, upon reasonable terms, strike out the pleadings in equity, and require the parties to plead at law in the action and may try and determine the cause according to the practice in actions at law.

SEC. 4. In any action at law, any defendant in addition to his defense at law, may plead in defense to the plaintiff's claims, any matter which would be ground for relief, in equity, and shall receive such relief as he would be entitled to receive in equity against the claims of the

plaintiff, such matter of defense shall be pleaded in the form of a brief statement in a notice attached to the plea of the general issue. And by counter brief statement any plaintiff may plead any matter which would be ground for relief in equity against any defense or set-off set up by any defendant in an action at law in said court, and shall receive such relief as he would be entitled to receive in equity against such claim of defendant.

SEC. 5. Where equitable defenses are pleaded under the provisions of this Act, the truth of the facts so pleaded shall be verified by the party pleading the same or some one on his behalf, and the issues formed by pleading such equitable defenses, shall be tried according to the practice in equitable actions, and before the trial of the issues under the pleadings at law in the same action.

SEC. 6. Whenever, in such action, any matter which would be ground for relief in equity is so pleaded by any party,the Court may make such decrees and restraining orders as may be necessary to protect and preserve such equitable rights, and may issue injunctions, according to the usual practice in equitable actions.

SEC. 7. Any party may annex to his declaration or plea, bill of complaint or answer, written interrogatories to any one or more of the adverse parties concerning any of the material matters in issue in the action, the answers to which, on oath, may be read by either party as a deposition between the party interrogating and the party answering, and subject to the same rules as depositions; provided that the parties answering, shall not be confined to responding merely to interrogatories, but may state any new matter concerning the same cause of action.

SEC. 8. The interrogatories shall be answered within twenty days after the service of the same on the adverse party or his attorney or solicitor, unless within the same time they are excepted to by such party; in which event on the motion of either party, the Court shall determine as to the propriety of the interrogatories propounded, and which of them shall be answered and within what time such answer shall be made.

SEC. 9. In answering the interrogatories, the party answering shall distinguish clearly between what is stated from information or belief merely. An unqualified statement of a fact shall be considered as made of his personal knowledge.

SEC. 10. The answers to interrogatories shall be verified by the affidavit of the party answering, to the effect that the statements in them made, of his own personal knowledge are true, and those made from the information of others he believes to be true.

SEC. 11. Whenever a party filing interrogatories, also files therewith an affidavit that he verily believes that the subject of the interrogatories, or any of them, is in the personal knowledge of the opposite party, and that his answer thereto, if truly made from such knowledge, will

sustain the claim or any part thereof, of the party filing such interrogatories and shall set forth in said affidavit, the facts he expects to prove by said answers and the opposite party shall fail to answer such interrogatories within the time allowed therefor, or by the Court extended, the facts set forth in said affidavit, shall be taken as admitted to be true by the party so failing to answer.

SEC. 12. The Court may compel answers to interrogatories by process of contempt, and may, on the failure of the party to answer them after reasonable time allowed therefor, dismiss the declaration or bill of complaint, or quash the plea or the answer of the party so failing to answer.

SEC. 13. The answers to interrogatories according to the practices provided in this Act, shall be in lieu of the discovery by answer, in actions in equity, provided that nothing in this Act shall be so construed as to prohibit the Court from requiring any party to any action to submit to an examination as a witness in open court or before a commissioner under Statutes or rules of court now in force or hereafter enacted.

SEC. 14. All exceptions to bills or answers, and all questions arising on the pleadings in an action shall be heard on motion by the Court in the first instance without a reference to a Circuit Court Commissioner.

SEC. 15. The actions of debt and covenant are hereby abolished, and all in cases where by law or Statute, either of said actions is a proper action to enforce a remedy the action of assumpsit shall be maintainable.

SEC. 16. The action of trespass on the case is hereby abolished and in all cases where by law or Statute, the action of trespass on the case is a proper action to enforce a remedy, the action of trespass shall be maintainable.

SEC. 17. It shall not be necessary in any declaration in an action, to set forth any statement not required to be proven, unless such statement is required by some rule of Court or Statute of this State. The statement of losing and finding, the statement of promises in suits on implied contracts, and all statements of like character shall be omitted. And any declaration shall be sufficient in substance which sets forth facts entitling the plaintiff therein to recover.

SEC. 18. Any defense showing that a contract, written or oral, or any instrument sued on, is void or voidable; or that the instrument was delivered to a person in escrow, or showing matter of justification, excuse, discharge or release, and any defense which admits the facts of the declaration, but by some other matter seeks to avoid their legal effect, must be set forth in the notice of special defense, attached to the plea of the party making such defense.

SEC. 19. In actions of assumpsit brought against defendants, sued as joint debtors, the plaintiff shall not be required to discontinue as to any of them; but the jury shall show by their verdict, or the Court by its

finding in a trial by the Court, which of them are and which of them are not liable to the plaintiff, and verdict finding and judgment shall be given and entered accordingly, and such of the defendants as have judgment in their favor, shall recover costs against the plaintiff.

SEC. 20. Whenever in any action the defendant by his notice of defense attached to his plea, admits the facts declared upon, but seeks to defeat the same by set-off, or by recoupment, or by affirmative defense which admitting the facts declared upon, defeats plaintiff's recovery, such defendant shall have the opening and closing in the taking of testimony, and in the argument, on the trial of the cause.

SEC. 21. A complainant shall not be required to set forth in any bill or replication, and a defendant shall not be required to set forth in any answer, any statement not required to be proven. Formal repetitions in such pleadings shall be omitted. It shall not be necessary that any of the papers in an action in equity be subscribed by the parties thereto or by counsel. The affidavit affixed to papers in such cases shall be signed by the party swearing to the same. The replication, aside from the title, of the court and cause, shall by a brief statement demand a hearing on the matters set forth in the bill and answer.

SEC. 22. In every bill of complaint the statements made therein shall be divided into paragraphs numbered consecutively, and each paragraph shall contain, as nearly as may be, a separate and distinct allegation. And the prayer shall pray specifically for the relief complainant may conceive himself entitled to, and also for general relief, and shall be subdivided into paragraphs, numbered consecutively, each praying separate relief.

SEC. 23. A defendant who answers, must answer fully every allegation in the bill material to the issue as to him, and every material allegation not so answered shall for the purposes of the action be taken as true. And every answer shall be divided into paragraphs, numbered consecutively, and each paragraph shall contain as nearly as may be, a separate and distinct allegation; and the answer shall state the matter, answering the allegations of the bill before it enters upon any statement of the defendant's case, or statement of the facts upon which the defendant claims by answer, the benefit of a cross bill.

SEC. 24. The Supreme Court shall have the power by rule, to abolish the use of rule books and motion books, in the Circuit Courts; and to determine the kind of record books, the forms of the entries for, and the manner of entering, and recording the proceedings in such Courts.

SEC. 25. The Circuit Court shall in every stage of any action disregard any error or defect in the pleadings or proceedings therein which does not affect the substantial rights of the adverse party, and no order, judgment, or decree shall be reversed or affected by reason of any such error or defect.

THREE SUBJECTS THAT SHOULD RECEIVE CONSIDERATION BY THE NEXT LEGISLATURE.

WILLIAM K. CLUTE.

One of the principal fields of usefulness for the Michigan State Bar Association is to exercise its influence in moulding legislation to correct defects in the general statutory and common law of our State. Thus far, it has met annually, heard some excellent papers read, resolved a few times, appointed committees that seldom report, feasted and toasted itself, and adjourned for the year. Its power to accomplish results other than ethical and educational has not as yet, been tested. The opportunity will soon present itself for this Association to increase its use and efficiency, in a broad sense, by petitioning our next legislature for the enactment of such measures as it may deem to be in the interest of the people of the State of Michigan, but which would be quite apt to escape attention through individual action.

Hon. George H. Durand, the Association's president in 1893 most fittingly expresses the sentiment I wish to convey in the following language: "In these days of unions and combinations of all kinds, colors and degrees, it is a lamentable fact that individual effort, however intellectual and unselfish it may be, is powerless to obtain legislative relief upon subjects of general public importance," and further on in the address he says, "after agreeing upon what should be done, committees authorized to speak for the entire Association should be selected to petition for such legislation as is wanted to correct some of the more glaring abuses which exist in the State and of which every good lawyer is cognizant, and through which, unfortunately, too many of his clients are compelled to suffer great wrong and outrage." (*Mich. Law Jour., vol. II, p. 253.*), and in harmony with the suggestions in this address, I take occasion through the JOURNAL to call the attention of the Association to a few general matters of personal observation which might be improved by legislative action, and are required by equity and good conscience.

I.

ADMISSION TO THE BAR.

A bill to regulate admission to the bar might appropriately be recommended by this Association to the next legislature. The necessity of such regulation has been frequently discussed in our meetings, and the writer took occasion to fully express his views on the subject in volume two of the MICHIGAN LAW JOURNAL, page 412, under the title of "The Need of a Higher Standard of Qualification for Admission to the Bar." Time often tempers and moderates one's views, but I have yet an abiding conviction that what was said therein still holds true.

The State of New York adopted a bill of that character at the last

session of the legislature, and while some of its features might need changing to suit Michigan, the general effect is all as we should have it. It seems to me that a bill of that nature should embody as its main features, provisions for a single State examining board, composed of men of experience and high standing in the profession.

The first point secured will be a guarantee of the second, which is, thorough examinations, embracing not only inquiries as to the applicant's knowledge of common law and equity jurisprudence and practice, but also a fair knowledge of our country's history, our federal constitution, and our State constitution. I do not wish to be understood as advocating a standard embracing all the intricate problems of constitutional law, but it seems to the writer that the main features of our organic law, the fundamental principles of our form of government should be well understood by attorneys, at least as well as by one who has studied civil government in our high schools. When attorneys are admitted, they are required to take a constitutional oath; and not only that, but to practice their profession under it. If this requirement is placed at the threshold, it cannot but help to distribute patriotic advocates of America's boasted liberty and freedom all through the warp and woof of society, who will by their influence, increase respect and love for our institutions, our people, our flag.

Loyalty to one's country is surely worth cultivating. With our Altgelds', Waites' and Herr Mosts' abroad in the land, and all the other social, anarchistic influences at work with their doctrines and beliefs permeating the minds of the people, it is well to have a "set-off," and as there is no occupation that comes closer to administering, framing and construing our laws in their true spirit than that of the lawyer, they should be required to possess a good knowledge of their whys and wherefores. We need to get back to first principles, and learn the cost of our liberties. To conclude this subject, I quote the words of Vice-President Stevenson, in his address at the last meeting of the New York State Bar Association, which might, with wisdom, be remembered: 'The impress of the genius of the colonial lawyers is indeliby stamped upon our organic law, wherein is garnered up for all the ages the fruits of the successful struggle for independence. Words cannot express our obligation to the lawyers who, in the convention of 1787 formulated and bequeathed as an enduring legacy to their countrymen the great compact which for more than a century has held people and States in one indissoluble union. Madison, the lawyer, has been called 'the father of the constitution;' Hamilton, the lawyer, of whom it has been said, 'he touched the dead corpse of the public credit, and it sprang upon its feet;' Marshall, 'the second maker of the constitution;' Jackson, the lawyer, who, having achieved victory over the enemies of his country, achieved a yet greater victory over himself by returning his sword to its scabbard and bowing in

submission before the majesty of the offended law; Webster, whose matchless exposition of the constitution cast a weird spell over his countrymen, and three decades later nerved the heart of every defender of the federal union. It was an Illinois lawyer who, at the crucial moment, uttered the words that will live while we have a country or a language, 'that this nation, under God, shall have a new birth of freedom, and that government of the people, by the people and for the people shall not perish from the earth.' May we not abide in the faith that, inspired by the words and the deeds of the men of this noble profession, who have made resplendent every page of the first century of our country's history, their successors, in the near and the remote future, on the bench and at the bar, whatever danger may menace, will faithfully guard and transmit to coming ages the precious legacy of free government."

II.

A transition to a subject entirely foreign to the proceding section may not possess a pleasing rhetorical effect, but I aim to be practical.

RAPE SHOULD NOT BE A DEFENSE UNDER AN INFORMATION FOR INCEST.

Under Act No. 112, laws of 1887 the age of consent of female children is fixed at fourteen years, and any person who shall carnally know any child under such age is deemed to have committed the crime of rape, but in case a person shall have carnal commerce with a female within the prohibited degrees of consanguinity, then he can show a valid defense, as the law now is, under an information for incest, that the intercourse was with a child below the age of consent; that the acts committed constitute rape, not incest, and therefore that he is entitled to an acquittal. That actual force was used and therefore the offense was rape, and that he is, for that reason, entitled to an acquittal, also obtains where the female is above the age of consent.

In the case of the *People v. Jenness, 5 Mich., 305*, the Supreme Court holds that incest can only be committed by the concurrent act of two persons of opposite sexes; and the assent or concurrence of the one is as essential to the commission of the offense as that of the other.

And in *People v. De Groat, 39 Mich., 124*, this language is quoted approvingly by Judge Cooley: De Groat was indicted for incest with his daughter, a child under ten years of age, and because the child was under the age of consent, and De Groat having been convicted of incest in a case where it was impossible for the child to give its consent (an essential element to constitute incest) the Court held that the only offense he could be guilty of, was rape; but as he had been convicted of incest, and as the evidence showed that crime under the law in his case to be impossible, the prisoner was discharged. But had De Groat committed the same acts with the child of a neighbor, not a relative, he would have been liable to imprisonment for life; through a lack of statutory provision to cover his

case the same acts committed with his own child, aggravated in infamy by a wanton disregard of the natural duty of affection a parent owes to his offspring, he is furnished the open door of escape from the just penalty outraged decency and justice would place upon him. This question is also discussed by our Court in *People v. Skutt, 56 N. W., p. 12*, but the Court does not depart from the doctrine laid down in the Jenness and De Groat cases. It seems to me that the whole matter can be remedied by enacting a law to the effect that where a man is informed against for incest, he shall not escape conviction by setting up the defense that his offense was not incest, but rape, on account of the use of force where the female is above fourteen, or on account of the female being under fourteen, and lacking the capacity to consent. A section something like this, following Section 9291 Howell's Annotated Statutes would help to cure this defect: "The offense of incest, as to the man, under the above section shall be deemed to exist, though the connection is effected without the consent of the woman. In case the female is under the age of consent the offense of incest, as to the man shall also be deemed to exist, notwithstanding the incapacity of such female to give her consent to the connection. Under every information for incest the jury shall return with their general verdict in the case they find the prisoner 'guilty,' a special verdict in case the connection was with a female above the age of consent with force and against her will, 'guilty, with force,' if such fact is proven. And in case such female is under the age of consent, they shall render with their general verdict, if guilty, 'guilty with a female under the age of consent,' if the age of the female is so proven. In all cases where a man is convicted of the crime of incest committed either with force and against the will of the female, or with a female under the age of consent, he shall upon such conviction be punished by imprisonment in the State prison for life or for any term of years."

III.

NATIONAL BANK STOCK SHOULD BE LIABLE ON EXECUTION.

Under our present law, shares of stock in a National banking corporation cannot be levied upon by execution or seized by attachment in this State. There seems to be no good reason why this species of property should not be as readily available to the creditors of a stockholder in a National bank as are the shares of stock of a debtor in a bank or other corporation organized under our State laws.

There seems to be no constitutional prohibition against the remedy to be applied. The results to be accomplished are desirable, the attention of the Association is therefore called to this question, and an amendment to Section 7697 Howell's Statutes so that it will read: "Any share or interest of a stockholder in any National banking corporation doing business in this State, and any bank, insurance company, or other joint stock company, that is or may be incorporated under the authority of, or authorized to be created by any law of this State may be taken, etc.," will remedy the whole matter. This will obviate the necessity of a creditor being obliged to have an execution returned unsatisfied, and then resorting to a remedy in equity in order to reach this species of property usually considered to be quite heavily gilded on the edge.

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NOTES.

CAUCUS LAWS.—Act No. 303 of the Session Laws of Michigan for the year 1887 as amended by Act No. 175 of the Session Laws of 1893 has not proved in practical operation, a very successful caucus law. It seems unable to suppress two great evils, illegal voting at primary elections and bribe taking at conventions. There has been considerable discussion of various plans for remedying these defects, but so far no good plan at all finished in detail, has been suggested. Some well known men have advocated radical changes, and the general trend of thought seems to favor precinct caucuses and voting from registration lists as a remedy for the former evil, and the abolition of conventions so far as possible to check the latter evil. It is yet a problem which puzzles all who think of it, but it must be solved in some way.

THE COMING MEETING OF THE ASSOCIATION OF JUDGES.—The Association of Judges of Michigan which was formed last winter, will hold its first regular meeting at Lansing on December 27th. The session will begin at 1 o'clock in the afternoon and continue through that and the following day.

Judges Kinne, Vance, Carpenter and Frazer have accepted invitations to present addresses, and it is hoped that several others who have been also requested to do so will likewise accept. Reports will be made by the committees on legislation, Judges McMahon, Lane and Buck; on rules, Judges Peck, Carpenter and Aldrich.

All judges of the courts of record of this State are eligible to membership, and those who are not as yet members are urgently requested to join the Association.

The officers of the Association are as follows: President, F. J. Russell; vice-president, S. B. Daboll; secretary and treasurer, J. B. Moore.

CHANGES IN THE MICHIGAN CIRCUIT COURT PRACTICE.—The July number of the Journal contained an article written by Mr. Chester L. Collins, the chairman of the Bar Association Committee on Legislation and Law Reform, on "Some Practical Suggestions for the Reform of Michigan Circuit Court Practice." In the present issue we publish a copy of a bill drawn up by Mr. Collins embodying the reforms proposed by him in that article.

We hope that the members of the Bar Association and the lawyers generally throughout the State will give the proposed measure their consideration. We are confident that that is all that is necessary to enable it to become a law. It is worthy of universal support and will greatly improve the present practice in many particulars. It will not, if enacted, introduce anything like a code but will merely simplify practice in both

law and equity, and make the rules of the two courts the same in cases where there is no reason why they should be dissimilar. Indeed, those who are opposed to codification should especially favor the intended changes, for a satisfactory common law system will be the surest thing to prevent the adoption of a code. Irrespective of this, however, all will agree that as long as the present system is retained it should be made as perfect as possible. This is the object of the reforms advocated by Mr. Collins, and hence we wish the measure all the success which it deserves.

THE ANNUAL MEETING OF THE CHICAGO BAR ASSOCIATION was held in that city on Saturday, October 27th. The proceedings as reported by the *Chicago Legal News* afford some interesting reading.

The much-mooted question of codification was discussed at considerable length. A resolution that the Association should request the legislature to pass an act authorizing the governor to appoint a committee of three, to prepare and present to the next session of the legislature a code of civil procedure, was introduced, and referred to the committee on amendments to the law.

The advocates of codification in Illinois have made persistent efforts to change the present common law practice but hitherto they have been unsuccessful.

Under the auspices of the Association a bar primary was held previous to the Republican and Democratic judicial conventions to nominate eight candidates for judge. Four were chosen from each of the two parties. The four Republicans were nominated by their party and were elected. Only one of the Democrats received his party's nomination, and he in common with all but one of the Democratic judicial ticket was defeated.

The reports of the various committees show that the Association is in a flourishing condition and takes an active part in all matters of interest to the profession.

THE SUPREME COURT'S CONSTRUCTION OF THE ELECTION LAW OF 1891 IN THE CASE OF ATTORNEY-GENERAL VS. SCOTT.—The apparent construction given by the Supreme Court, to the election law of 1891, and thereby materially affecting the essential features of the Act of 1893, evoked much adverse criticism, and seemed destined to raise a multiplicity of contested election cases. The opinion was rendered upon an information in the nature of *quo warranto* in the matter of Attorney-General ex-rel James A. Scott vs. James Glasier, a contest over the office of Comptroller of West Bay City. Two questions were involved, one relating to the duties imposed by statute upon the canvassing board, and which had not been strictly complied with in this instance; the other bearing upon the subject of distinguishing marks as affecting the validity of ballots cast. The former question was disposed of with but little consideration, while the major portion of the opinion was devoted to the subject of distinguishing marks. The provisions of Act No. 190 of the Laws of 1891, which were in force when the election in question was held, had never before been presented to the Court for construction. Maine, Rhode Island and Indiana statutes were cited by the Court, and a review of the constructions placed

upon them by the respective State Supreme Courts, was embodied in the opinion. These constructions enjoined a strict compliance with the requirements of the statutes, by virtue of the "radical departure from the former method of voting." The Michigan Supreme Court held that the cases cited supported what they believed to be the true rule, "that any mark upon a ballot other than one appropriate and necessary under the law to designate the intention of the voter, must be regarded as a distinguishing mark;" and further that "the only instance in which an unnecessary mark is recognized as possible, is in Sec. 34, where it is provided that if the elector votes for more than one person for the same office, such ballot shall not be counted for those persons, but shall be, as to them, null and void." The Law of 1891 specially provided under Sec. 26, that the name of the candidate on the opposing ticket, for whom one desired to vote should not only be marked with a cross, but that the name of the candidate on the voter's own ticket should be erased. The Law of 1893 dispenses with this requirement. It is the enunciation of the rule governing erasures, that has given rise to such general misinterpretation of the Courts true construction. The Court held, "the law provides that when the candidate desires to vote a straight ticket, it shall only be necessary to mark a cross under the party name. In such cases there are no conditions under which the voter is requred to erase names on another party ticket, or place any mark on such tickets, unless he desired to vote for some candidate whose name appears thereon, in which case he is required to place a cross in the square opposite the name of such candidate. There are a number of ballots counted for the respondent in which the voter has, after marking one party ticket, erased by a cross or straight mark the names on the opposing ticket. As these marks of erasure are not only wholly unneccessary, but under the law inappropriate to express any intent, they must be treated as distinguishing marks." By way of elucidation rather than retraction or amendment, the Court in a subsequent opinion rendered upon motion made and granted for a rehearing, has succeeded in calming the unrest which had possessed the parties most actively interested. The informal opinion states: "An examination of the opinion leads us to think that some of the language employed may have been misleading, and as the public are naturally deeply interested in the subject matter, we think it proper to state that it was not in the mind of the Court that ballots having a name erased under the party ticket, and the name of an opposing candidate marked by a cross should not be counted, but that in our opinion, such tickets are not legally objectionable, and should be counted." Many persons were of the opinion that the erasure clause had been construed to be mandatory, while the explanatory opinion unmistakably construes it to be merely directory. The concluding proposition in the opinion holds. "Taken as a whole we think it was intended by the Act of 1893, that such an erasure be treated as permissible, though not necessary."

RECENT SUPREME COURT DECISIONS.

ADVERSE POSSESSION.—Occupation by adverse possession need not be such as to inform a stranger that some one is asserting title. If it be such as to warn the owner that a person is in possession under a hostile claim it is sufficient. *Whitaker* v. *Erie Shooting Club.*

ATTORNEY AND CLIENT.—Proof of delivery of a check to an attorney and payment of same by the bank is sufficient to establish a receipt of the money by the client. *Duquette* v. *Richar.*

CLAIM AGAINST ESTATE—HOMESTEAD EXEMPT DURING MINORITY OF HEIRS.—An heir of an estate consisting only of a homestead held on a land contract not fully paid up, paid the balance due and included this item with others in a claim against the estate, which claim was allowed as a valid debt. The other heirs were minors. On a bill seeking to enforce a lien against the property, *held*, that complainant in submitting his claim to the Probate Court elected his remedy and cannot commence suit to enforce the claim for money paid for the balance of price of the homestead. Also that complainant has no lien on the premises and that the same cannot under the Constitution be sold during the minority of any of the heirs. *Kraft* v. *Kraft et al.*

DIVORCE—AMENDMENTS TO PLEADINGS—TESTIMONY.—It is proper to allow the amendment of a verification and the filing of a replication after decree has been entered. How. Stat., Sec. 6281, which provides: "No divorce shall be granted unless the party exhibiting such petition or bill of complaint therefor . . . and no proofs or testimony shall be taken in any cause until four months after the filing of such petition or bill of divorce," etc., applies only to proofs taken in support of the petition or original bill for divorce, and does not apply to proofs taken under an answer in the nature of a cross bill. *Daly* v. *Hosmer, Circuit Judge.*

ELECTION LAW OF 1891—DELAY IN CANVASS—DISTINGUISHING MARKS.—Delay of inspectors of election in making returns required under Secs. 36 and 38, of Act 190, Laws of 1891, will not result in a disfranchisement of voters. 2. Any mark placed upon a ballot other than one appropriate and necessary under the law to designate the intention of the voter, will be regarded as a distinguishing mark and will render such ballot void. *Attorney-General ex rel. Scott* v. *Glaser.* Ballots having a name erased under the party ticket and the name of an opposing candidate marked by a cross, are not legally objectionable and should be counted. *Idem. (Opinion on motion for rehearing).*

ELECTIONS—POWER OF COUNTY BOARD OF ELECTION COMMISSIONERS TO PREPARE BALLOTS—WHEN SEPARATE BALLOTS MAY BE USED.—In accordance with a resolution passed by the board of supervisors of Berrien County a proposition was submitted to its electors for the removal of the county seat. It was *held* on certiorari, that where State or county measures are to be voted upon, or State or county officers are to be elected to fill vacancies, the county election commissioners may prepare such ballots. The ballots may be separate from those prepared for the township officers and may be deposited in separate boxes. *Peck* v. *Supervisors of County of Berrien.*

FAILURE TO SETTLE CASE FOR SUPREME COURT.—Where no case is settled in accordance with the statute, the proofs taken below will not be considered but the case will be decided on bill and answer. *Field* v. *Colby.*

HUSBAND AND WIFE—TESTIMONY.—After divorce a husband cannot, under Sec. 7546, 3 How. Stats., testify to an act of adultery committed during marriage. *Hanselman* v. *Dovel.*

LIEN OF VENDOR OF PERSONAL PROPERTY.—Where an article is sold under an agreement "that said article is and shall remain the property of said vendor until each and every of said amounts and interest thereon and any judgment rendered thereon is paid in full" the vendor's lien is not released by his obtaining a personal judgment against the vendee; nor will the title to such article pass until payment of the judgment. *Fuller* v. *Byrne.*

MANDAMUS—WILL NOT BE GRANTED WHEN AN ABSOLUTE LACK OF POWER TO EXECUTE IT IS SHOWN.—Mandamus was applied for to compel defendant to do certain

street paving. On a showing that defendant was financially unable to do it, *held*, that mandamus will not issue unless it clearly appears that the person to whom it is directed has the absolute power to execute it. *City of Benton Harbor* v. *Street Railway Co.*

MISJOINDER OF PLAINTIFFS—LIEN FOR LABOR—WAIVER OF EXEMPTIONS.—Plaintiffs who had been partners brought an action of trover claiming legal exemption for one of them in property seized and sold on execution by the defendants. The property in question had been left with defendants who had put labor upon it and claimed a lien on a part which had not been delivered to plaintiffs. *Held*, that the partnership rights in the property were concluded by the levy, and if one plaintiff had no right to exemption he had no cause of action and was improperly joined as plaintiff. 2. Before the property delivered to the defendants was to be used for the purpose of trade their labor was necessary and a lien attached for this labor. 3. Under the contract the plaintiffs by delivering the paper and other property to defendants waived their exemptions and subjected the property to the lien of defendants for their labor. *Rogers et. al.* v. *Raynor et al.*

RAILROADS—SPECIAL ASSESSMENTS FOR MUNICIPAL IMPROVEMENTS—MANNER OF COLLECTION.—On a bill filed by a railway company to vacate certain assessments against it as illegal, on the ground that it was not liable for assessments for municipal street improvements, *held*, that whatever rights as to taxation that it might have under a special charter, were personal to it, and did not extend to a leased road organized under a general railroad act. 2. Under the general railroad law, the words, "in lieu of all other taxes upon the properties of such companies" does not preclude the levying of an assessment for local improvements such as complained of in bill. 3. A railroad company is an entirety and cannot be cut up and taxed and sold for taxes in parcels. 4. Although sales of parts of a railroad for local assessments are void, assessments for municipal improvements are legal and collectible under a general clause in a municipal charter authorizing their collection. *L. S. & M. S. Ry. Co.* v. *City of Grand Rapids et. al.*

REPLEVIN—RIGHT OF POSSESSION OF PROPERTY WHERE NEITHER PARTY IS THE GENERAL OWNER.—A mortgagee, brought replevin against a subsequent mortgagee for the possession of certain goods, *held*, that How. Stats., Sec. 8312, which permits a certain discretion to the court in replevin suits where it is shown that one of the parties has a lien on the goods, does not apply to a case where neither party is a general owner. The prior lienor has the right of possession until the amount of his lien be tendered or paid. *Olin* v. *Lockwood.*

RIGHTS OF ASSIGNEE—CHARGE TO JURY—FRAUD.—In an action to recover property on the ground that the title never passed, the rights of the assignee are the same as those of the assignor. The rule that an action for fraud is not assignable has no application to an assignment of something which is in itself tangible, capable of delivery, and which involves a right of property. 2. A charge that the plaintiff could recover if defendant made fraudulent representations; or was in failing circumstances and did not disclose it; or was absolutely insolvent at the time of the purchase of the goods; is error. To constitute fraud there must be an intent not to pay. *Reeder Bros. Shoe Co.* v. *Prylinski.*

STATE OF MICHIGAN IS LIABLE FOR INTEREST ON JUDGMENTS.—Under Sections 7756 and 8984, How. Stats., though the word interest is not used, the State of Michigan is liable for interest on judgments the same as private individuals. *F. & P. M. R. R. Co.* v. *Board of State Auditors.*

TRUST.—The rule that when the bill of complaint fails to allege a written or parol agreement or declaration of trust, the court will presume the same to be in writing, will not apply where counsel admit that there was no written declaration. *Thompson* v. *Farley et. al.*

WITHDRAWAL OF LOCAL CHURCH FROM MAIN ORGANIZATION.—A bill was filed to enjoin defendants from interfering with complainant Hettler in the discharge of his duties as presiding elder of Zion's church of the Evangelical Association of North America, in Bay City. It was claimed by defendants that by a majority of the votes of the trustees and the members of the congregation the church had withdrawn from the general body. *Held*, that they could not take with them for their own purposes or transfer to any other religious body the property dedicated and conveyed to the religious association nor could they prevent its use by those who chose to remain in the church and who represent the regular church organization. *Fuchs et al.* v. *Weissel et al.*

BOOK REVIEWS.

WORKS' COURTS AND THEIR JURISDICTION.—A Treatise on the Jurisdiction of the Courts of the Present Day, How such Jurisdiction is Conferred, and the Means of Acquiring and Losing It. By JOHN D. WORKS, formerly one of the Justices of the Supreme Court of the State of California, and author of "Indiana Pleading and Practice," and of "Removal of Causes from State to Federal Courts." Cincinnati: The Robert Clark Company. One vol., 8 vo. 918 pp. $6.00.

Judge Works' time during the past few years has very evidently been well spent That he has had the experience and learning necessary to the production of a good book has already been demonstrated by his previous works. The same admirable qualities are manifested in this book. In addition, there is something about it that impresses one with the feeling that it is the finished product of a mind that has been at work with a view to instruct and entertain the profession by giving them the benefits of his careful observatian, thought and research, and not with the simple superficial object to "write a book." The subject is a broad one to cover, but the thorough knowledge of the author of every detail is clearly apparent. He has discussed the subject in an independent manner, but has not llowed personal prejudice to dwarf his views. He has not hesitated to add his disapproval to the practice of some courts of deciding a case upon a test of weight of authority based upon the number of decided cases and aot upon reason. The work has been divided into six chapters. In the nrst a general discussion of courts is given. The second is given up to fi discussion of the general principles affecting jurisdiction, under which as considered the different kinds of jurisdiction, how conferred and reguiated, how the question of jurisdiction may be raised, how proved and disapproved, and the effect of want of jurisdiction, etc. Also of the inherent powers of courts and of illegal and *de facto* courts. Chapters three and four treat of the means of acquiring jurisdiction and venue. In chapter five is given a most interesting and thorough discussion of the powers, duties and authority of judges, including power to act in another district, authority at chambers, authority to act in vacation, and *de jure* and *de facto* judges. Also bias, prejudice or interest of judges as affecting jurisdiction, and the liability of a judge acting without jurisdiction. The excellent work is made complete by an exhaustive chapter upon common law, equity, and statutory jurisdiction. Upon the whole, it is really one of the most interesting and useful books that have come to our table.

TENURE AND TOIL; OR LAND, LABOR AND CAPITAL.—By JOHN GIBBONS, LL. D. Chicago: Donohue & Henneberry.

Probably the best way to give an idea of the ground covered by this work is to make a summary of its contents. The first book treats of the right of property and the history of land tenures, and contains an interesting review of the laws of the ancients relating to the inheritance and ownership of land. In the second and third books the author discusses

the origin, growth and decadence of feudal tenures, and again takes up the subject of the right of property. "Labor, its Wrongs and Remedies" is the title of the fourth book. This is one of the most interesting parts of the work. The last two books advocate the suppression or trusts, and a more equal distribution of population and of property. In discussing the question of capital and labor the author proposes that both should share in the profits which are the joint product of the both. This he claims is no Utopian scheme but has already been practiced with success, notably in the case of the Krupp gun works in Germany. Arbitration also receives its share of the author's attention, who considers that it is the only way of preventing strikes and lockouts. The book is well written throughout and merits success.

CURRENT LITERATURE.

President David Starr Jordan, of Stanford University, contributes a very forceful article upon "The Need of Educated Men," to the December *Popular Science Monthly*. The article abounds in sound historical argument, and cannot but inspire all who read it with renewed zeal and ambition. Dr. Mary Taylor Bissell writes a very sensible article upon "Athletics for City Girls," and Dr. Paulsen considers "The University as a Public Workshop." (New York: D. Appleton & Co. Single numbers, 50 cents. Yearly subscriptions, $5.00.)

The *North American Review* for December contains two valuable articles on "The Meaning of the Elections," by Senator Faulkner and Congressman Babcock, chairmen respectively of the Democratic and Republican Congressional committees. "Our Experiments in Financial Legislation," by Comptroller Eckels, "Brigandage on Our Railroads," by Hon. Wade Hampton, and "How the Czar's Death Affects Europe," by Sergius Stepniak, are three of the other important and timely articles. (New York: North American Review.)

Among the more notable features of the December *Forum* are: "May a Man Conduct his Business as he Please," by Col. Carroll D. Wright; "Status and Future of the Woman Suffrage Movement," by Dr. Mary Putnam Jacobi; "Death of the Czar and the Peace of Europe," by Col. T. A. Dodge; "Stock-sharing as a Preventive of Labor Troubles," by Louis R. Ehrich; "Will Polygamists Control the New State of Utah?" by Glen Miller, and "The 'Baltimore Plan' of Currency Reform," by A. B. Hepburn. (New York: The Forum Pub. Co. 25 cents a copy. $3.00 a year.)

The December *Atlantic* contains a memorial article on Oliver Wendall Holmes, by the editor, in which mention is very properly made of Dr. Holmes' constancy to that magazine, a characteristic shown still more strikingly in his passion of local patriotism. Miss Agnes Repplier writes of "Ghosts" in an entertaining manner, and some one signing himself "Franklin Eastman" indicts a very spicy letter "To An English Friend." (Boston: Houghton, Mifflin & Co. 35 cents. Yearly, $4.00.

The name of *The American Journal of Politics* has been changed to *American Magazine of Civics*, under which name the January number will be issued. In this closing number of the present volume C. W. Wiley predicts the speedy dissolution of the "People's Party." The Hon. George Gary has a proposed remedy for railroad troubles. Julia H. Twells writes on "The Burden of Indiscriminate Immigration," in a forceful manner. (New York: Andrew J. Palm & Co. 25 cents. One year, $3.00.

Littell's Living Age gleams every week from the richest literary field. Its readers are made acquainted with the best specimens of English literature, and are kept abreast of the times on all the many questions of public interest, biography, history, travel, discovery, science, art, etc. They are enabled with a small outlay of time and money, to keep pace with the best thought and literature of the day. (Boston: Littell & Co. Weekly, 18 cents. $8.00 a year.)

The *Public Opinion* of November 29 was a book number, and was issued with a handsome colored cover as a Thanksgiving number. It continues to improve where there is little ground for improvement. It reflects public opinion, as gained from upwards of 3,000 of the leading newspapers, in a perfectly fair, non-partisan and unbiased manner. It covers the whole field of politics, civics, sociology, finance, commerce, science, religion, art, literature and miscellany. No other journall attempts to give as much for the money. (Washington: The Public Opinion Co. Weekly, 5 cents. $2.50 a year.

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